Supreme Court, U.S.
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92-1616

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LOCAL 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Federal District Courts and the National Labor Relations Board both have the statutory authority to decide whether a successor employer has assumed the collective bargaining agreement of a predecessor employer. The question presented is whether the Circuit Courts of Appeal, which require only a showing by a preponderance of the evidence of assumption, and the National Labor Relations Board, as affirmed by the Second Circuit Court of Appeals, which requires proof of assumption of a collective bargaining agreement by a clear and convincing standard of proof, raises a conflict concerning the

proper standard of proof to be used in contract assumption cases. As a corollary to this question is the further question of whether the Board can require a clear and convincing standard on contract assumption cases given the Board's statutory mandate in Section 10(b) of the Act (29 U.S.C. 160 (b) that violations need be proven only by a preponderance of the evidence.

2. Did the Second Circuit, in principle, create a conflict with decisions of the First Circuit Court of Appeals in NLRB v. Donna Lee Sportswear, Co., 836 F.2d 31 (1st Cir. 1986) and the Ninth Circuit in NLRB v. Heyman, 541 F.2d 796 (9th Cir. 1976), by refusing to grant collateral estoppel effect and full faith and credit to the decision of a prior

State Court of Appeals (a court of competent jurisdiction) finding that a successor employer assumed the collective bargaining agreement of its predecessor.

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Local 32B-32J, Service Employees International Union, AFl-CIO, the National Labor Relations Board, Field Bridge Associates and Rachel Bridge, Corp.

The Petitioner is an unincorporated association which is affiliated with the Service Employees International Union, an international labor organization. As an affiliate of the International Union, Petitioner is also affiliated with the AFL-CIO.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit below, Docket Nos. 92-4039, 92-4055 is reported at ____ F.2d ____. It is appended hereto as Exhibit "A". That opinion enforced an order of the National Labor Relations Board (hereinafter "NLRB").

The opinion of the NLRB below is reported at 306 NLRB No. 72. Said Order adopted the findings of the NLRB's Administrative Law Judge (hereinafter ALJ). Both opinions are appended hereto as Appendix "B".

JURISDICTION

The Court of Appeals Order is dated January 7, 1993. The statutory provision believed to confer jurisdiction on this Court to review the Order in question is 28 U.S. Sec. 1254 (1).

STATUTES INVOLVED

The National Labor Relations Act (the "Act") Section 8(a)(5) and (1), 29 U.S.C.Sec. 158 (a)(5) and (1) (West 1979) imposes upon a successor employer who has assumed a collective bargaining agreement of its predecessor a contractual and legal obligation to abide by those terms. Section 10(b) of the act, 29 U.S.C. 160(b), provides that violations of the Act need be proved only by a preponderance of the evidence.

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. Sec. 185(a) (West 1979) vests the Federal District Courts of the United States and State Courts of competent jurisdiction with the authority of ascertaining the existence of a collective bargaining agreement, including the authority to ascertain if

a successor employer assumed the collective bargaining agreement of its predecessor.

28 U.S.C. Sec. 1738 imposes upon Federal Courts the duty to grant State Court judgments res judicata effect:

> "Judicial proceedings [of Courts of any state] shall have the full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the Courts of such State".

REASONS FOR GRANTING THE WRIT

Since jurisdiction for enforcement of and suits under collective bargaining agreements is granted in the first instance to the courts, subsequent determinations by the NLRB using a harsher and stricter standard of proof (i.e. clear and convince as opposed to a preponderance of the evidence) will conflict with the decisions of the courts on these same questions. Hence in subsequent proceedings involving the same issues, and the same parties, a conflict, as in the case at hand, comes to light where the highest court of the State has found a successor employer to have assumed a collective bargaining agreement, only to have the NLRB subsequently reject the court's holding, because it was not shown to be based upon the Board's stricter rule of

evidence requiring clear and convincing proof.

The First and the Ninth Circuits have rejected the NLRB's right to review de novo a question of contract assumption once a court of competent jurisdiction has made such a determination. The Second Circuit, in principle, now holds to the contrary, by permitting the NLRB to review the question of contract assumption de novo and under a stricter standard of proof (i.e. clear and convincing proof) than is prevalent in Court and as mandated by the NLRA (Section 10(b) of the NLRA requires only a preponderance of the evidence). Litigants who have been told by a court of competent jurisdiction in no uncertain terms that they have assumed and are bound by the terms of their predecessor's collective bargaining agreement with a union

should not four years later be told by the NLRB that the contract has not been assumed. This is especially true when the same documents and evidence form the basis for the conflicting decisions.

STATEMENT OF THE CASE

Background

In late 1986, Field Bridge Associates ("Field Bridge") and Rachel Bridge, Inc. ("Rachel Bridge") agreed to purchase two apartment buildings-then known as Ebbets Field Housing Complex (Ebbets Field) and Washbridge Apartments (Washbridge)-from Cedar York Properties Limited Partnership (Cedar York). The closing on the properties took place over a period of days commencing in June 1987. At the time of the purchase, both properties had been managed by Arco Management Corporation (Arco).

At the properties, Arco employed approximately 130 employees, who were members of the Union. Their duties included maintenance, service and security work. Arco, as managing agent

for the owners,[1] had agreed to be bound by the terms of a collective bargaining agreement (the Agreement) between the Realty Advisory Board, a multi-employer association, and the Union.

Field Bridge and Rachel Bridge took over operations of the respective properties on July 1, 1987. Field Bridge immediately terminated Arco as managing agent, and Rachel Bridge did the same one month later. Both new owners, however, retained all of Arco's former employees. After July 1, Field Bridge and Rachel Bridge stopped remitting union dues to the Union, and Field Bridge refused to make contributions to the employees health

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[1]Under established practice in the real estate industry, although the managing agent of the property will sign the agreement, it does so as agent for the owner. See Property Advisory Group, Inc. v. Bevona, President Local 32B-32J, 718 F.Supp. 209 (S.D.N.Y. 1989).

and pension fund. Rachel Bridge stopped making health and pension contributions one month later. However, both employers continued deducting the dues from the pay of their respective employees through the litigation and advise their employees that the deductions were proof of continued coverage under the Union Welfare Fund.

Several months after the purchase of the two apartment buildings, Field Bridge subcontracted out the security guard work and laid off the Union security guards. Rachel Bridge followed suit in January 1988. The Union responded by grieving to arbitration the unlawful terminations. When it became clear that the employers were totally ignoring the contracts, the Union struck. The strike at Washbridge lasted only a day, and the

strikers returned to work. The strike at Ebbets Field was more protracted, prompting Field Bridge to contract with an outside firm to provide the apartment complex with maintenance and other services. All the strikers at Ebbets Field finally requested to return to work in September 1988, but Field Bridge made offers of reinstatement only to some.

During this same time period, the Union had sought to add Field Bridge and Rachel Bridge as parties to arbitration proceedings the Union had initiated under the Agreement. These proceedings involved grievances that had originally been brought against Arco. In response to the Union's attempts to join them as parties, Field Bridge and Rachel Bridge each moved in New York State Supreme Court to stay arbitration on the ground that neither

was bound by the Agreement.

In April 1988, after a brief hearing at which no witnesses were called,[2] Judge Gammerman of the New York State Supreme Court ruled from the bench, denying Field Bridge's motion and directing it to submit to arbitration. Judge Gammerman observed, using federal labor law as basis for his findings, that the "general indicia in this case as revealed by the papers certainly indicates an assumption of the [collective bargaining] agreement." In November 1988, the Appellate Division affirmed, without opinion. Thereafter, the New York Court of Appeals denied review.[3]

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[2]The record however, consisted of almost three hundred pages of documentary proof and affidavits submitted by the parties to support their respective position.

[3]Under the New York Civil Practice Laws and Rules Section 7503 a hearing is necessary only when there exists a

The Union used this judgment to assert collateral estoppel against Rachel Bridge's petition, then before State Supreme Court Judge Moskowitz, to stay the other arbitration proceeding. In November 1988, Judge Moskowitz took note of the Appellate Division's affirmance of Judge Gammerman's ruling and gave it preclusive effect, ordering Rachel Bridge to arbitrate. Because Judge Moskowitz simply relied on Judge Gammerman's prior order, the latter is the critical state-court ruling in this case. Rachel Bridge did not seek to appeal Judge Moskowitz's judgment and order.

Meanwhile, the Union had filed a

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triable issue of fact. The Appellate Division of the New york Supreme Court and the Court of Appeals of the State of New York rejected Fieldbridge's argument that there was a triable issue of fact and accordingly affirmed Judge Gammerman's decision finding that Fieldbridge as a matter of law assumed the collective bargaining agreement.

series of unfair labor practice charges with the NLRB against Field Bridge in June and November 1988 and against Rachel Bridge in August 1988 and July 1989.[4] In February and August 1989, the Regional Director issued complaints, which were later consolidated. The consolidated complaint alleged that Field Bridge and Rachel Bridge had violated §§ 8(a)(1) and (5) of the National Labor Relations Act, as successor employers, by failing to remit dues and initiation fees to the Union or to make required contributions to the employee health and pension funds. The complaint also alleged that Field Bridge had violated

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[4]All charges were filed more than six months after the assumption of the agreements, which under traditional NLRB would have precluded the Board from questioning this matter anew (See Section 10(b) of the Act). Although this argument was raised below, neither the Board nor the Court of Appeals addressed the problem.

§§ 8(a)(1) and (3) of the Act by refusing to reinstate strikers who had made unconditional offers to return to work.

Before the administrative law judge (ALJ), Field Bridge and Rachel Bridge asserted as an affirmative defense that they had never assumed the Agreements and therefore were not required to remit dues and initiation fees to the Union or to contribute to the health and pension funds.[5] The Union moved to strike this defense, arguing that the state court judgments holding that the Agreements had been assumed were entitled to preclusive effect. The ALJ rejected this motion. After a hearing, the ALJ reaffirmed his

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[5]The Second Circuit held that the Employers asserted that they "were not successor employers". This is factually incorrect. The Employers both acknowledged they were successor employers and at a minimum obligated to recognize and bargain with the Union.

conclusion that neither Field Bridge nor Rachel Bridge had assumed the Agreements and further found that they had not violated the Act by refusing to remit dues and initiation fees to the Union or by failing to make payments to the health and pension funds. The ALJ did, however, find that Field Bridge had violated §§ 8(a)(1) and (3) by refusing to reinstate all strikers who had not already received offers of re-employment, but that neither Field Bridge nor Rachel Bridge had otherwise violated the Act.

The Board adopted the ALJ's recommended order in its entirety although rejecting part of his legal analysis. In affirming the ALJ's ruling that there had been no assumption of the Agreement, the Board emphasized that it required "clear and convincing evidence of consent, either

actual or constructive, before [it] will find an assumption of the contract occurred." The Board further indicated its unwillingness to adhere to the First Circuit decision in National Labor Relations Board. v. Donna Lee, supra and the Ninth Circuit decision in National Labor Relations Board v. Heyman, supra.

POINT I

THE BOARD MAY NOT UTILIZE A STRICTER STANDARD OF PROOF THAN THE COURTS IN ANALYZING THE QUESTION OF CONTRACT ASSUMPTION

Under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. Sect. 185(a), the federal district courts of the United States are vested with the jurisdiction of "suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce". Under this provision the district courts or State courts of competent jurisdiction, using federal labor law, may compel parties to comply with an arbitration provision in a Labor agreement. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). Section 301's "strong policy favoring judicial enforcement of collective

bargaining contracts....sustain[s] the jurisdiction of the district courts over enforcement suits even though the conduct involved was arguably or would amount to an unfair labor practice within the jurisdiction of the National Labor Relations Board. Haines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562, 96 S.Ct. 1048, 1055, 47 L.Ed.2d 231 (1976). Included within this jurisdiction is the authority to ascertain the issue of a contract's existence or validity.

The Fifth Circuit, in United Steelworkers of America, AFL-CIO v. Rome Industries, Inc., 437 F.2d 881 (5th Cir. 1970), affirming 321 F.Supp. 1170, held that as a rule, the test for the existence of a contract consists of the normal rules of offer, acceptance and intent. 321 F.Supp. at 1174. This same test was accepted by the Eleventh

Circuit in Board of Trustees v. Universal Enterprises, 751 F.2d 1177 (11th Cir. 1985).

Thus, while the Court's treat contract assumption as factually intensive, the standard of proof is nonetheless as required in most civil actions, i.e. a preponderance of the evidence. The Board, as affirmed by the Second Circuit Court of Appeals, perceives that the Supreme Court's decision in NLRB v. Burns International Services Inc., 406 U.S. 27 (1972) places an affirmative restriction on the Board to use the utmost restraint in applying the adoption or assumption of a contract by a successor. All State Factors, 205 NLRB 1122, 1127 (1973).[6] A reading of Burns discloses

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[6]The All State analysis was rejected by the District Court in Steelworkers v. Deutz-Allis Corporation, WD Missouri, Docket No. 86-0166-CV-W-O, decided 3/11/86, 122

an admonishment to the Board that assumption cases are factually intensive. But no-where does the Supreme Court counsel against a finding of assumption unless clearly and convincingly proven.

Moreover, a review of the legislative history of the Act's provision on the standard of proof belies the Board's and the Circuit's holding that the Board may use different standards depending on the kind of finding at issue. (Slip opinion at page 732).

When the Act was initially passed, the burden of proof required a finding of a violation on "all the testimony". In the debates relating to the 1947 amendments, proposals were made to amend this language because of the problems the old test gave to the

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LRRM 2035.

Courts of Appeal. The various proposals, were intended to provide a the standard of proof that would give the courts real power "rather than fictitious power to review decisions of the Board". House Report No. 295 of H.R. 3020, Legislative History of the Labor Management Relations Act 1947, p.296 (herein referred to as "Legislative History"). The above proposal was later changed to a test of the "weight of the evidence". This proposal was frowned upon because

> "If this proposed change means something more than a preponderance of evidence, it introduces a undesirable change in administrative procedure. The rule has uniformly been that an agency may rest its findings upon a preponderance of evidence. No proper reason exists to make an exception in the case of the National Labor Relations Board. The only effect of the proposal is to hinder the prevention of unfair labor practices by rendering the proof of such practices more difficult.

(Legislative History at p.382). With the above in mind, that the Board's purpose is to hinder the prevention of unfair labor practices by rendering proof of violations less difficult, the compromise language as contained in the Act, provides:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any named person...has engaged in...such unfair labor practice,...the Board shall...[serve] on such person an order....If upon the preponderance of the testimony taken the Board shall not be of the opinion that person named in the complaint has engaged in...such unfair labor practice then the Board...shall issue an order dismissing the said complaint

Section 10(c), 29 U.S.C. 160(c).

It was Congress' intent to make it easier to prove unfair labor practices. It appears that the Board and the Second Circuit believe that notwithstanding this clear mandate,

obstructions can be placed to make it more difficult to prove violations in those areas where, for whatever reasons, political or otherwise, a violation is not desirable. Thus, the Board's reading of Burns as counseling utmost restraint in finding a violation is in direct contradiction with the Congressional intent that violations be made easier to prove, not more difficult.

As to the Circuit's attempt at distinguishing the clear and convincing aspect on contract assumption from the preponderance of evidence to establish a violation, the holding is unclear and is based upon faulty logic. If the standard is stated to require a lower threshold, logically it cannot require an issue upon which the Board ultimately relies upon in its finding to be based upon a stricter standard.

With all due respect to the Second Circuit, the question has been skirted with an analysis that belies any logic. In this case the whole would be lesser than the sum of all it parts. Since the Board relies on its earlier decision in All State Factors, supra, which requires clear and convincing proof of assumption as the basis for a violation of the Act, the artificial distinction enunciated by the Circuit is erroneous and inconsistent with the Board's prior holdings.

Given the inconsistent positions taken by the First and Eleventh Circuits in cases involving burdens of proof in contract assumption cases, as opposed to the Board's stricter holding though the affirmance of its decision by the Second Circuit, a clarification is needed as to what standards are to be used in proving contract assumption

cases and on a broader scale, can different standards be used merely because the case is brought under Section 301, as opposed to the NLRA.

POINT II

THE BOARD IS COLLATERALLY ESTOPPED FROM FINDING NO CONTRACT ASSUMPTION.

The Supreme Court in Smith v. Evening News Association, 371 U.S. 195, determined with finality, that "preemption" of the N.L.R.B. is inapplicable to actions under Sec. 301 of the Labor Management Relations Act. (29 U.S.C. Sec. 185.) Indeed, contract claims were properly left "to the usual processes of the law". Charles Dowd v. Courtney, 368 U.S. 502, 513; NLRB v. Strong, 393 U.S. 357 at fn. 5 (citing legislative history).

It is clear that Courts have jurisdiction under Sec. 301 of the Labor Management Relations Act (29

U.S.C.A. Sec. 185 (c)) to entertain "suits for violations" of collective bargaining agreements. It is equally clear that State Courts have concurrent jurisdiction of Sec. 301 suits with the Federal Court (Dowd Box Co. v. Courtney, 368 U.S. 502). Their judgments, therefore, are equally binding.

In the instant proceeding the State Court found that the purchasers had in fact and law assumed the predecessors' labor contracts. The Board found that they did not. Compare this with the Ninth Circuit's analysis in NLRB v. Heyman, supra:

> Although the authority of the Board to deal with an Unfair Labor Practice which also violates a collective bargaining agreement is not displaced by Sec. 301, the Board's authority does not supplant the jurisdiction of the Courts: Amalgamated Ass'n of Street Elec. Railing and Motor Coach Employees of America v. Lockridge, 403

> U.S. 274, 297, 300 (1971); Smith v. Evening News, supra. An implicit collateral attack, launched through the filing of charges, premised on the contract, may not be entertained by the Board under the guise of different policy considerations. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 375-77 (1940); Swift and Co. v. U.S., 276 U.S. 311, 326 (1928); Higginson v. Schoeneman, 190 F.2d 32 (CADC 1951); 49 CJS Judgments Sec. 401, cf. Kalb v. Feuerstein, 308 U.S. 433, 439 (1940) (emphasis added.)

The Court held that

> We are of the opinion that the jurisdictional grant within Sec. 301 carries with it both the powers necessary to enforce judgments and to give judgments effect in such quasi-judicial forums as the NLRB, through the application of such doctrines as res judicata or collateral estoppel (citations omitted, but substantial, emphasis added)

(NLRB v. Heyman et al 541 F.2d 796, 799 9th Cir. (1976)

As noted, heretofore, the Court of Appeals of the New York State Supreme

Court refused to review the finding of the Appellate Division affirming the trial court's finding of contract assumption.

The New York Supreme Court held, without hesitation or limitation, that the collective bargaining agreement was assumed, in its entirety, by Fieldbridge. The New York Supreme court held likewise with regard to Rachel Bridge.

The record reflects that before both Court's were the identical arguments. As Judge Gammerman correctly noted:

> "...the law is relatively clear that you can determine whether or not you assumed the collective bargaining agreement from the general indicia...That the general indicia in this case as revealed by the papers certainly indicates an assumption of the agreement...I read the Howard Johnson cases. And I also read the cases that were cited by the respondent and,

I find those cases more persuasive.

This Court has noted that collateral estoppel/res judicata law applies to state court judgments. Migra v. Warren City, 104 S. Ct. 892, 896 (1984). The second Circuit has held that 28 U.S.C. Sec. 1738 is "the logical starting point for any analysis of the extent to which a prior State Court judgment precludes a subsequent action brought in a Federal Court. That statute imposes on Federal Courts the obligation to give full faith and credit to judgments entered by State Courts of competent jurisdiction. The Federal Court presented with a State Court judgment is required to give that judgment the same force and conclusive effect as it has in the State in which it was rendered." (Winters v. Lavine, 574 Fd.2d 46, 54 (2nd Cir. 1978)) Moreover, the Court has stated that

the applicability of 28 U.S.C. Sec. 1738 "ordinarily...would require an analysis of the res judicata effect of the State Court proceedings within that State, involving examination of the local law of res judicata." (Winters v. Lavine, supra.)

The New York Court of Appeals has explained the doctrine of res judicata, etc., thusly.

"Sound public policy requires that different decisions shall not be made on the same state of facts, and that a judgment rendered...shall be conclusive, as to the questions litigated and decided, upon the parties thereto and their privies, whom the judgment, when used as evidence, relieves from the burden of otherwise proving, and bars from disproving, the facts therein determined." (Fulton Co. G. E. Co. v. Hudson Riv. T. Co., 200 N.Y. 287, 296). That principle requires that "what has been definitely determined by competent tribunal shall be accepted as irrefutable". It has been said that within the field in which the principle is applicable it "renders white that which is black, and straight that which is crooked. Facit excurvo rectum, ex albo nigrum. No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its

legal efficacy." (Jeter v. Hewitt et al, 22 How. [U.S.] 352.) The reasons underlying the principle indicate the limits of the field within which the principle applies. "The fundamental principle governing the general doctrine of res adjudicata" is "that a party shall not be heard a second time on an issue which he has once been called upon and permitted to try and contest." (Henrick v. Biggar, 209 N.Y. 440, 444). "The rules of law upon this subject are founded upon these evident principles or axioms that it is for the interest of the community that a limit should be prescribed to litigation, and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been done or so tried, all litigation of that question, and between those parties, should be closed forever. (Matter of N.Y.S. Labor Relations v. Holland Laundry, 294 N.Y. 480, 493). (Emphasis added)

The doctrine elucidated herein has been restated, recently, by the Court of Appeals in Gramatan Home v. Lopez, 46 N.Y. 2d 481, 485. The Court explained that;

> Collateral estoppel, together with its related principles merger and bar, is but a component of the broader doctrine of res judicata

which holds that, as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein, in any subsequent action (Matter of Shea, 309 N.Y. 605, 616; cf. Matter of McGrath v. Gold, 36 N.Y. 2d 406, 410-411). This principle, so necessary to conserve judicial resources by discouraging redundant litigation, is grounded on the premise that once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again. (B.R. DeWitt, Inc. v. Hall 19 N.Y. 2d 141, 144; Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 18). Collateral estoppel is a corollary to the doctrine of res judicata; it permits in certain situations the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was necessarily raised and decided. (Statter v. Statter, 2 N.Y. 2d 668; Siegel, New York Practice, Sec. 464, Par. 614; 9 Carmody-Wait 2d N.Y. Pract. Sec. 63:204, Par. 208-209; cf. Ashe v. Swenson, 397 U.S.

436, 443).

The Court then enunciated the well followed rule that;

> Thus, it is well settled that the term parties to a judgment within the contemplation of the rule of collateral estoppel is not confined to those who are named in the record or enter an appearance. For example, collateral estoppel bars not only parties from a previous action from litigating an issue decided therein, but those in privity with them as well (Downey v. Seib, 185 N.Y. 427, 433)...the term denotes a mutually successive relationship of the same rights to the same property (see Downey v. Seib, supra; Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 129), and permits utilization of collateral estoppel for the benefit of or against persons who were not parties to the previous action but who were connected with it to such an extent that they are treated as if they were parties.[7]

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[7]The Board and the Second Circuit, in principle, disagree with the 1st Circuit holding NLRB v. Donna Lee Sportswear Co. Inc., 836 F.2d 131 (1st Cir. 1987) and the 9th Circuit in NLRB v. Heyman, 542 F.2d 796 (9th Cir. 1976)

In Winters v. Lavine, the Court noted that,

> "in its traditional formulation, the rule of res judicata can have dramatic impact: 'The general rule of res judicata is that a valid, final judgment, rendered on the merits, constitutes an absolute bar to a subsequent action between the same parties, or those in privity with them, upon the same claim or demand. It operates to bind the parties both as to issues actually litigated and determined in the first suit, and as to those grounds or issues which might have been, but were not actually raised and decided in that action.'" The first judgment, when final and on the merits, thus puts an end to the whole cause of action.'" (Winters v. Lavine, supra, 56, Footnote "10", (emphasis added).

The Court further found,

> "The New York courts appear to recognize that the two lawsuits are based on the same cause of action 'if a different judgment in the

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that the Board is in privity with the parties to the State court action.

> later action would destroy or impair rights or interests established by the earlier action.'" "Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N.Y. 304, (see also Winters v. Lavine, supra at 56, see substantial authority and at 58, Footnote "13"; Schwartz v. Public Administrator, 24 N.Y .2d 65).

It is certain that if the Board's order were permitted to exist as is, it such would "destroy or impair rights or interests established by the first judgment". If the Court were to determine, now, that an assumption of the agreement does not exist and that the substantive terms of the alleged collective bargaining agreement need not be adhered to, then the New York State Supreme Court's judgments denying the stays of the arbitration and finding that the agreements were assumed could be agreed to be rendered null and void. Thus, instead of granting the State Court judgments full

faith and credit, the Federal Court would effectively vacate the State Court judgments.

Nor is the res judicata, etc., effect of a judgment affected by the existence, or lack thereof, of an evidentiary hearing. The Court, in Potter v. Emerol Mfg. Co., 275 AD 265, 89 N.Y.S. 2d 68, 70, held;

> Though the facts underlying such determination were supplied by affidavits instead of oral testimony, we think that a judgment on the merits entered on such motion would be a bar to a second suit if there is sufficient identity between the causes of action alleged in the two complaints.

Indeed the Court went even further and held in Eidenberg v. Zellermayer, 5 AD 2d 568, 174 N.Y.S. 2d 300, 304.

> On this history it is clear that the prior judgment is res judicata as to the present cause of action. A motion granting summary judgment is on the merits. Riley v. Southern Transportation Co., 278 App.

Div. 605, 101 N.Y.S. 2d 906; 5 Carmody-Wait, Cyc. N.Y. Prac., Summary Judgment, Sec. 44. A judgment on the merits precludes the maintenance of a second action based upon the same transaction if the evidence and the issues in both are the same Marsh v. Masterson, 101 N.Y. 401, 407, 5 N.E. 59, 61; Hull v. Hull, 225 N.Y. 342, 353-354, 122 N.E. 252, 255-256; Cromwell v. County of Sac, 94 U.S. 351, 352-353, 24 L.Ed. 195; Restatement, Judgments, Sec. 61). The former judgment is final not only as to every essential matter which was received to sustain or defeat the claim or demand but as to any other admissible and essential matter which might have been offered for that purpose. Pakas v. Hollingshead, 184 N.Y. 211, 217, 77 N.E. 40, 42, Cromwell v. County of Sac, supra)...event assuming, and it is not clear that this is so, that the subsequent action proceeds on a different theory, the prior judgment may, nevertheless, be a bar. A judgment on the merits precludes another action based on the same foundation facts -- in a special sense, the same cause of action -- even though a different theory for similar relief is set forth (Schuylkill Fuel Corp., 250 N.Y. 304, 165 N.E. 456;

Restatement, Judgment, supra Sec. 63).

It is well established that preclusion of relitigation will take effect where one's interests were represented in the prior action, (accord Ashton v. City of Rochester, 133 N.Y. 187, 193, 30 N.E. 965, 31 N.E. 334 (1892); Weisz v. Levitt, 59 AD 2d 1002, 1003 399 N.Y.S. 2d 720, 721 (3d Dept. 1977); Graham v. Board of Supervisors, 25 A.D. 2d 250, 252, 269 N.Y.S. 354, 361 (Sup. Ct. 1929), aff'd, 228 App. Div. 750, 238 N.Y.S. 887 (4th Dept. 1930).

Thus the "essential consideration is that the interests...were at stake in the prior litigation" (Grossman v. Axelrod, 466 F.Supp. 770, 775).

Thus, the Second Circuit, in refusing to grant collateral estoppel effect to the New York State judgment

under New York collateral estoppel law, has in principle effectively created a split in the Circuits concerning the NLRB's obligations under this doctrine of law. In Donna Lee and Heyman the First and Ninth Circuits respectively, required the Board, as being in privity with the parties, to be bound by any prior Court judgments on the question of contract assumption. The Ninth Circuit, bluntly and accurately framed the issue as

> "The crux of the matter is what effect the Board must give a United States District Court judgment which is antithetical to the Board's subsequent determination regarding the validity of a collective bargaining agreement".

NLRB v. Heyman, 541 F.2d at 797. The Court went on to hold that when a district court is faced with the question of the contract's existence, the Board's authority does not supplant

the jurisdiction of the Court. This analysis was adopted by the First Circuit in Donna Lee. Yet, in the matter at hand the Second Circuit declined in principle to follow this analysis, resulting in a conflict among the Circuits.

As a result of the Second Circuit's analysis and decision affirming the Board, there exist two sets of conflicting authority, both of which are binding upon the parties. The State Courts have found the contracts to have been assumed. The Second Circuit has found the contracts to have not been assumed. Such a predicament cannot be left unresolved. It is therefore appropriate for the Supreme Court to grant Certiorari so as to resolve not only the conflict among the Circuits, but also the conflict as to which of the judgments the parties

are bound.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully
submitted,

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Counsel of Record
March 31, 1993

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 24, 81—August Term 1992

Argued: September 1, 1992 Decided: January 7, 1993

Docket Nos. 92-4039, 92-4055

LOCAL 32B-32J SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

FIELD BRIDGE ASSOCIATES and
RACHEL BRIDGE CORPORATION,

Intervenors-Respondents.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—and—

LOCAL 32B-32J SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO,

Intervenor-Petitioner,

—against—

FIELD BRIDGE ASSOCIATES,

Respondent.

Before:

FEINBERG, NEWMAN and CARDAMONE,
Circuit Judges.

Petition of Union to review, and petition of National Labor Relations Board to enforce, an order finding that Field Bridge Associates committed unfair labor practices in violation of §§ 8(a)(1) & (3) of the National Labor Relations Act.

Enforced.

IRA A. STURM, New York, NY (Manning, Raab, Dealy & Sturm, of Counsel) *for Local 32B-32J, Service Employees International Union, AFL-CIO.*

MARTIN GRINGER, Garden City, NY (Franklin & Gringer, P.C., of Counsel), *for Field Bridge Associates and Rachel Bridge Corporation.*

MICHAEL J. GAN, attorney, National Labor Relations Board, Washington, DC (Jerry M. Hunter, General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel), *for National Labor Relations Board.*

FEINBERG, *Circuit Judge*:

In these consolidated appeals, Local 32B-32J, Service Employees International Union, AFL-CIO (Union), petitions for review of an order of the National Labor Relations Board (NLRB or Board), and the Board petitions for enforcement of its order. Field Bridge Associates (Field Bridge) and Rachel Bridge Corporation (Rachel Bridge), employers of workers represented by the Union, have intervened in the former appeal on the side of the Board, and the Union has intervened in the latter on the side of the Board. The principal issue before us is whether the Board was collaterally estopped by state-court rulings, made in the course of actions to stay arbitrations, that these employers had assumed the collective bargaining agreement under which the employers' predecessors and the Union had been operating. We must also decide whether the Board may require clear and convincing evidence of consent before it will find that an employer has assumed a collective bargaining agreement.

We hold that the Board was not collaterally estopped by the state-court rulings and that the Board may use a standard of clear and convincing evidence on the issue of assumption. We deny the Union's petition for review and enforce the Board's order in its entirety.

I. Background

In late 1986, Field Bridge and Rachel Bridge agreed to purchase two apartment buildings—then known as Ebbets Field Housing Complex (Ebbets Field) and Washbridge Apartments (Washbridge)—from Cedar York Properties Limited Partnership (Cedar York). The closing on the properties took place over a period of days commencing in June 1987. At the time of the purchase, both properties had been managed by Arco Management Corporation (Arco).

At the properties, Arco employed approximately 130 employees, who were members of the Union. Their duties included maintenance, service and security work. Arco had agreed to be bound by the terms of a collective bargaining agreement (the Agreement) between the Realty Advisory Board, a multi-employer association, and the Union.

Field Bridge and Rachel Bridge took over operations of the respective properties on July 1, 1987. Field Bridge immediately terminated Arco as managing agent, and Rachel Bridge did the same one month later. Both new owners, however, retained all of Arco's former employees. After July 1, Field Bridge and Rachel Bridge stopped remitting union dues to the Union, and Field Bridge refused to make contributions to the employees health and pension fund. Rachel Bridge stopped making health and pension contributions one month later.

Several months after the purchase of the two apartment buildings, Field Bridge subcontracted out the security guard work and laid off the Union security guards. Rachel Bridge followed suit in January 1988. The Union responded by striking. The strike at Washbridge lasted only a day, and the strikers returned to work. The strike at Ebbets Field was more protracted, prompting Field Bridge to contract with an outside firm to provide the apartment complex with maintenance and

other services. All the strikers at Ebbets Field finally requested to return to work in September 1988, but Field Bridge made offers of reinstatement only to some.

Meanwhile, the Union had sought to add Field Bridge and Rachel Bridge as parties to arbitration proceedings the Union had initiated under the Agreement. These proceedings involved grievances that had originally been brought against Arco. In response to the Union's attempts to join them as parties, Field Bridge and Rachel Bridge each moved in New York State Supreme Court to stay arbitration on the ground that neither was bound by the Agreement.

In April 1988, after a brief hearing at which no witnesses were called, Judge Gammerman of the New York State Supreme Court ruled from the bench, denying Field Bridge's motion and directing it to submit to arbitration. Judge Gammerman observed that the "general indicia in this case as revealed by the papers certainly indicates an assumption of the [collective bargaining] agreement." In November 1988, the Appellate Division affirmed, without opinion. Thereafter, the New York Court of Appeals denied review.

The Union used this judgment to assert collateral estoppel against Rachel Bridge's petition, then before State Supreme Court Judge Moskowitz, to stay the other arbitration proceeding. In November 1988, Judge Moskowitz took note of the Appellate Division's affirmance of Judge Gammerman's ruling and gave it preclusive effect, ordering Rachel Bridge to arbitrate. Because Judge Moskowitz simply relied on Judge Gammerman's prior order, the latter is the critical state-court ruling in this case.

Meanwhile, the Union had filed a series of unfair labor practices charges with the NLRB against Field Bridge in June and November 1988 and against Rachel Bridge in August 1988 and July 1989. In February and August 1989, the Re-

gional Director issued complaints, which were later consolidated. The consolidated complaint alleged that Field Bridge and Rachel Bridge had violated §§ 8(a)(1) and (5) of the National Labor Relations Act, as successor employers, by failing to remit dues and initiation fees to the Union or to make required contributions to the employee health and pension funds. The complaint also alleged that Field Bridge had violated §§ 8(a)(1) and (3) of the Act by refusing to reinstate strikers who had made unconditional offers to return to work.

Before the administrative law judge (ALJ), Field Bridge and Rachel Bridge asserted as an affirmative defense that they were not successor employers, had never assumed the Agreement and therefore were not required to remit dues and initiation fees to the Union or to contribute to the health and pension funds. The Union moved to strike this defense, arguing that the state court judgments that the Agreement had been assumed were entitled to preclusive effect. The ALJ rejected this motion. After a hearing, the ALJ reaffirmed his conclusion that neither Field Bridge nor Rachel Bridge had assumed the Agreement and further found that they had not violated the Act by refusing to remit dues and initiation fees to the Union or by failing to make payments to the health and pension funds. The ALJ did, however, find that Field Bridge had violated §§ 8(a)(1) and (3) by refusing to reinstate all strikers who had not already received offers of reemployment, but that neither Field Bridge nor Rachel Bridge had otherwise violated the Act.

The Board adopted the ALJ's recommended order in its entirety. In affirming the ALJ's ruling that there had been no assumption of the Agreement, the Board noted that it required "clear and convincing evidence of consent, either actual or constructive, before [it] will find an assumption of the contract occurred."

II. The Union's petition

The Union's petition for review raises two major questions. The first is the preclusive effect of the prior state-court orders on the Board's determination of whether Field Bridge and Rachel Bridge had assumed the Agreement. The second is the Board's authority to require clear and convincing evidence before it will find that an employer has assumed a collective bargaining agreement.

A. *Preclusion*

In the two state-court proceedings, the state judges found, albeit with little discussion or analysis, that Field Bridge and Rachel Bridge had assumed the Agreement. The Union argues that these orders collaterally estopped Field Bridge and Rachel Bridge from relitigating the assumption question.

Citing its decision in Albritton Communications, Inc., 271 NLRB 201, 202 n.4 (1984), enforced, 766 F.2d 812 (3d Cir. 1985), cert denied, 474 U.S. 1081 (1986), the Board argues that it was not a party to the prior state-court litigation and so cannot be bound by the state court's finding of assumption. More broadly, the Board argues that it is "a public agency asserting public rights" and so "should not be collaterally estopped by the resolution of private claims asserted by private parties." The Board points out that the question of successorship obligations in the labor field has been the subject of several Supreme Court cases. See, e.g., Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987); NLRB v. Burns Int'l Sec. Services, Inc., 406 U.S. 272 (1972). Those decisions, the Board argues, indicate that the issue of successorship, as it affects an unfair labor practice proceeding, should be decided by the Board in the application of federal law and that the Board can never be precluded on successorship issues by state court findings. The reason is that unfair

labor practice proceedings implicate public as well as private interests, and that the Board is the agency that Congress has chosen to resolve the controversy—at least in the first instance.

The Board's arguments gain additional force in the context of this case. The hearings before the ALJ resulted in a record in this court of almost 2,000 pages, which included the testimony of 10 witnesses. The Board's claim, in effect, is that hasty state-court proceedings precipitated by the Union's efforts to join Field Bridge and Rachel Bridge as parties to pending arbitrations and culminating in an oral opinion should not deprive the Board of the power to decide the successorship issue in an unfair labor practice proceeding.

There is substantial force to the Board's argument, but we need not consider it further, since we believe that the Union's collateral estoppel claim fails under general principles of preclusion law, which call for decision here on a much narrower basis. Under those principles, apart from any requirement regarding identity of parties, "the bar of issue preclusion applies only if: (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." In re PCH Assocs., 949 F.2d 585, 593 (2d Cir. 1991) (citations omitted).[1]

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1 We understand the Union to base its collateral estoppel contention on federal common law principles and on the full faith and credit statute, 28 U.S.C. § 1738. While we note that the Third Circuit has recently held that § 1738 does not apply to the Board, see NLRB v. Yellow Freight Sys., Inc., 930 F.2d 316 (3d Cir.), cert. denied, 112 S. Ct. 78 (1991), we need not address this question here. As explained in the text, we do not think collateral estoppel applies on the facts of this case because the issue decided by the state courts and the issue decided by the Board were not the same.

(footnote continued)

We think that the first element set forth above—identity of issues—is not satisfied on the facts of this case. The Supreme Court in Howard Johnson Co. v. Hotel Employees, 417 U.S. 249, 262-63 n.9 (1974), made it crystal clear that characterizing an employer as a "successor" depends on the context in which the question of the subsequent employer's legal obligations to its predecessor's employees arises.

> [T]he real question in . . . "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative? The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue . . . . There is, and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others.

Id. (citations omitted); see also 1 Patrick Hardin, The Developing Labor Law 762 (3d ed. 1992); cf. Jim Beam Brands Co. v. Beamish & Crawford, Ltd., 937 F.2d 729, 734 (2d Cir. 1991) ("Issues that may bear the same label are nonetheless not identical if the standards governing them are significantly different.") (citation omitted), cert. denied, 112 S. Ct. 1169 (1992).

Thus, the Supreme Court has recognized that a subsequent employer may be obligated to arbitrate under its predecessor's collective bargaining agreement but not be otherwise obligated by that agreement. In John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964), the Court ruled that a sub-

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Consequently, it makes no difference whether federal common law or § 1738 provides the legal basis for the Union's claim.

sequent employer was bound by its predecessor's agreement to arbitrate, but left for arbitration the question of what other obligations of the collective bargaining agreement were binding on the subsequent employer. Id. at 547-51. This understanding of *Wiley* was made explicit in *Burns*, where the Court said that *Wiley*

> held only that the agreement to arbitrate . . . survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving company was bound by the other provisions of the contract.

Burns, 406 U.S. at 286; cf. NLRB v. Babad, 785 F.2d 46, 49 n.4 (2d Cir.) (noting distinction between arbitration provision and other provisions of labor contract in situation converse to present case), cert. denied, 479 U.S. 830 (1986).

Here, Judge Gammerman in the state court held that Field Bridge assumed the Agreement for the purpose of requiring Field Bridge to arbitrate grievances initially filed by the Union against Arco. Under *Wiley*, *Burns* and *Howard Johnson*, this holding does not mean that Field Bridge assumed the Agreement in full and is necessarily a successor with respect to legal obligations other than the obligation to arbitrate.

The Union relies heavily on NLRB v. Donna-Lee Sportswear Co., 836 F.2d 31 (1st Cir. 1987), and NLRB v. Heyman, 541 F.2d 796 (9th Cir. 1976), to support its collateral estoppel claim. In *Donna-Lee*, the First Circuit held that the Board was collaterally estopped by a federal district court finding, in a trustee's suit for payment of benefit funds, that no collective bargaining agreement existed between the employer and the union. Donna-Lee, 836 F.2d at 33. In *Heyman*, the Ninth Circuit similarly held that the Board was collaterally estopped

by a district court order, in a § 301 suit, rescinding a collective bargaining agreement. Heyman, 541 F.2d at 798.

However, in both *Donna-Lee* and *Heyman*, it was held that the issue before the federal district court and the issue before the Board were the same. Donna-Lee, 836 F.2d at 34 ("No party here can realistically dispute the fact that the issue of contract formation was not identical in both cases."); Heyman, 541 F.2d at 800 ("The Board was faced with . . . essentially the same contract issue . . . ."). Here, in contrast, the issues of agreement to arbitrate and of assumption of an entire contract are not the same, as the Supreme Court cases cited above make clear. Therefore, we agree with the Board that it was not bound by the prior state-court determinations.

B. *Standard of Proof*

In affirming the ALJ's decision, the Board observed that it "require[s] clear and convincing evidence of consent, either actual or constructive, before [it] will find that an assumption of the contract occurred." Field Bridge Assocs., 306 NLRB No. 72, at 5; 1991-92 NLRB Dec. (CCH) ¶ 17,118 (Feb. 14, 1992) (citing EG&G Florida, Inc., 279 NLRB 444, 453 (1986); All State Factors, 205 NLRB 1122, 1127 (1973)); accord United States Can Co., 305 NLRB No. 178, at 15; 1991-92 NLRB Dec. (CCH) ¶ 17,063 (Jan. 15, 1992).

The Union argues that the Board cannot impose this requirement. The Union draws our attention to § 10(c) of the National Labor Relations Act, which provides:

> If upon the *preponderance* of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice, then the Board shall state its findings of fact and shall issue . . . an order requiring such person to cease and desist from such unfair labor prac-

> tice . . . . If upon the *preponderance* of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any . . . unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

29 U.S.C. § 160(c) (emphasis added). The Union apparently believes that the Board here applied a higher standard of proof—clear and convincing—when it should have applied the lower preponderance standard.

As the Board points out, however, the Union misunderstands what the Board did. The Board did not apply a clear and convincing standard to determine the existence of an unfair labor practice. Rather, it applied the clear and convincing standard to determine whether or not a subsequent employer had consented, either actually or constructively, to assume the collective bargaining obligations of the former employer. It has been held that the Board may require different standards depending on the kind of finding at issue. See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 707-09 (1983); Chesapeake & Potomac Tel. Co. v. NLRB, 687 F.2d 633, 636-37 (2d Cir. 1982) (holding that waiver of statutory rights can be effectuated only if "intent to waive is clear and unmistakable from the evidence presented").

"In determining whether an employer has assumed its predecessor's labor contract, the NLRB is not bound by technical rules of contract law . . . [and] may adapt those rules to the collective bargaining context." Babad, 785 F.2d at 49-50 (citations omitted). The Board's decision to require clear and convincing evidence of consent is one such adaptation. According to the Board, "*Burns* . . . counsels utmost restraint in applying an adoption theory." All State Factors, 205 NLRB 1122, 1127 (1973). The clear and convincing requirement is intended to give effect to this counsel. Moreover,

"[t]he Labor Board has expertise in adjudicating successorship issues." In re Goodman, 873 F.2d 598, 603 (2d Cir. 1989). That expertise entitles a Board finding of successorship to a "high degree of deference." NLRB v. St. Mary's Foundry Co., 860 F.2d 679, 681 (6th Cir. 1988). Such expertise is also entitled to deference when the Board decides, as here, that an employer is *not* a successor. The Board's rule requiring clear and convincing evidence of consent before it will find that an employer assumed the collective bargaining agreement of its predecessor is neither "irrational" nor "inconsistent with the Act." NLRB v. Financial Inst. Employees, 475 U.S. 192, 202 (1986).

We are required to uphold the Board's finding that Field Bridge and Rachel Bridge did not assume the Agreement if that finding is supported by substantial evidence. Cf. Chesapeake & Potomac Tel. Co., 687 F.2d at 637. On our review of the record, we are satisfied that this requirement has been met. We have considered the Union's remaining arguments in support of its claim that Field Bridge and Rachel Bridge were bound by the terms of the Agreement and violated the Act by failing to comply with the Agreement's terms regarding union dues, initiation fees and contributions to the health and pension funds. We find these arguments without merit.

III. The Board's petition

The Board petitions for enforcement of its order holding that Field Bridge had committed unfair labor practices by "failing to offer reinstatement . . . to all of the strikers who had previously offered to return to work," but that neither Field Bridge nor Rachel Bridge had violated the Act "in any other manner."

In reviewing the Board's finding of an unfair labor practice, the "test we apply is . . . whether there is substantial

evidence on the record as a whole to support the Board's finding." Abbey's Transp. Services, Inc. v. NLRB, 837 F.2d 575, 579 (2d Cir. 1988) (citations omitted). Our review of the record indicates that the Board's order in this respect is supported by "substantial evidence." We have also considered Field Bridge's remaining arguments against the Board's order, and we find them without merit. For the reasons set forth above, the Board's order is enforced in its entirety.

APPENDIX "B"

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD

FIELD BRIDGE ASSOCIATES

and Cases 29-CA-13582
29-CA-13788

LOCAL 32B-32J, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

RACHEL BRIDGE CORP.

Cases 29-CA-13720
and (formerly 2-CA-23014)
29-CA-14230

LOCAL 32B-32J, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On August 22, 1990, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Union filed exceptions and supporting briefs. Respondents Field Bridge filed cross-exceptions and a supporting brief. Respondents Field Bridge and Rachel Bridge filed a brief in opposition to the exceptions. The Union filed an answering brief to Respondent Field Bridge's cross-

exceptions. Thereafter, the Respondent filed a motion to reopen the record, and the General Counsel and the Union filed statements in opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, to deny the Respondent Field Bridge's motion to reopen the record[1], and to adopt the

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[1]The motion to reopen the record cites a July 9, 1991 article in New York Newsday (Brooklyn Edition) in which Shop steward Oakley Harvey stated that: "Maintenance workers [at Ebbet's Field] walked off the job in support of security guards who went on strike to protest management's refusal to pay benefits...." Respondent Field Bridge argues that had Harvey made this statement at the hearing and been credited by the judge, the judge would have found that the strike at Ebbet's Field was for the unlawful purpose of forcing Field Bridge to recognize and

bargain with the Union for a unit of guards and nonguards.

The General Counsel and the Union argue that because the Respondent failed to call or subpoena Harvey to testify at the hearing, this newly proffered evidence does not satisfy the Board's Rules and Regulations, Sec. 102.48(d)(1), which states, in pertinent part, that:

> A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

We find merit in the General Counsel's and the Union's contentions. The evidence that the Respondent proposes to offer does not satisfy the Board's Rules. The Respondent failed to secure Harvey's testimony at the hearing in presenting its affirmative defense. A Respondent must exercise due diligence in gathering the evidence for presentation of its case. See A.N. Electric Corp., 276 NLRB 887 fn. 11, 897 (1985). Further, we are not presented here with new evidence indicating that a key witness may have committed perjury in testifying

recommended Order.

We adopt the judge's finding that neither Field Bridge nor Rachel Bridge assumed the existing Realty Advisory Board on Labor Relations (RAB) contract. We find no merit in the contentions of the General Counsel and the Union that the New York State courts' contrary findings are binding upon us.

Pursuant to the New York Civil Practice Law and Rules, Field Bridge sought to quash arbitration proceedings instituted by the Union concerning incidents which occurred prior to Field Bridge's assuming ownership of Ebbet's Field. In an oral ruling (there was no written opinion), Judge Ira Gammerman

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regarding a material fact. Rather, the proffered evidence bears only on the credibility of witnesses and as such does not warrant reopening the record. Compare Inland Container Corp., 273 NLRB 1856, 1857 (1985).

of the Supreme Court of the State of New York found that Field Bridge assumed the RAB agreement. The Court observed that "there were [sic] some administrative foulup, in that the document under which you[Field Bridge] had specifically assumed the agreement was never...signed or not presented because of what appears to be a rather complicating closing. And somebody just missed the boat." The Appellate Division affirmed, and the court of appeals refused permission to appeal. In a separate proceeding, Judge Gammerman's ruling was found to be binding on Rachel Bridge.

The Board adheres to the general rule that if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has

litigated unsuccessfully. Allbritton Communications, 271 NLRB 201, 202 fn. 4 and sources cited (1984), enfd. 766 F.2d 812 (3d Cir. 1985). Underlying this rule is the long-recognized principle that "Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 265 (1940). See also National Licorice Co. v. NLRB, 309 U.S. 350, 362-364

(1940); Section 10(a) of the Act (the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise...").

Thus, the Board, as a public agency asserting public rights should not be collaterally estopped by the resolution of private claims asserted by private parties. A number of circuit courts agree. The Fourth Circuit Court of Appeals has held that the Board's primary and exclusive jurisdiction to determine unfair labor practices renders Board decisions dispositive where they conflict with determinations in other forums. Peninsula Shipbuilders' Assn. v. NLRB, 663 F.2d 488, 492 (4th Cir. 1981). Similarly, the Fifth Circuit Court of Appeals has held that the Board's determination of

a work assignment dispute took precedence over a district court's ruling in a Section 301 arbitration proceeding that conflicted with the Board's determination. New Orleans Typographical Union No. 17 v. NLRB, 368 F.2d 755, 767 (5th Cir. 1966). And the Eight Circuit Court of Appeals reaffirmed the Board's jurisdictional competence to determine matters properly within its statutorily defined sphere, without being constrained to grant res judicata or collateral estoppel effect to Federal District Court judgments rendered in closely related Section 301 proceedings. NLRB v. Huttig Sash & Door Co., 377 F.2d 964, 970 (8th Cir. 1967).[2] In this

[2]We are aware that our failure to afford collateral estoppel effect to other state and Federal proceedings in certain circumstances is not without its critics. See NLRB v. Donna-Lee Sportswear Co., 836 F.2d 31 (1st Cir. 1987). Donna-Lee is distinguishable,

case, the Board was not a party to the New York State Court proceedings. Accordingly, we decline to give them a preclusive effect.

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however. The relationship between the Board and the Union here is not the same as that which existed in the Donna-Lee case. There the existence of a contract between Donna-Lee and the Union was the essence of the unfair labor practice charge. The issue of assumption of the contract is only one aspect of the unfair labor practices alleged here. The complaint alleged a violation of the Act based on successorship, an area where the Board's judgments under the Act are given particular deference, as well as an assumption of the labor agreement. See Fall River Dyeing Corp. v. NLRB, 482 U.S. 27 (1987). The General Counsel has not shown that the state court addressed or decided the successorship question. Further, in the instant case, the question of whether there is a contract has implications concerning the nature of a strike, i.e., whether that strike is an economic strike or an unfair labor practice strike, and this issue, in turn, has implications concerning Sec. 8(a)(3) of the Act. Where as here, the contract issue has implications concerning the nature of a strike and the provisions of Sec. 8(a)(4) of the Act, we believe that the Board should not be bound by a state court resolution of that contract issue.

We turn now to the merits of the General Counsel's contention that Respondents assumed the RAB contract. We agree with the judge that they did not. We have consistently exercised restraint in applying an assumption-of the-contract theory. We require clear and convincing evidence of consent, either actual or constructive, before we will find that an assumption of the contract occurred. See EG&G Florida, Inc., 279 NLRB 444, 453 (1986); All State Factors, 205 NLRB 1122, 1127 (1973). Here the evidence is ambiguous. Although the seller of the two apartment complexes appears to have understood that the Respondents would assume any labor agreements, and the contract of sale intimated as much, unmistakable written manifestation of the Respondents' intent with respect to the existing RAB contract is lacking.

Further, the Respondents did not take the steps necessary under the RAB contract's own terms to adopt it once the sale was consummated. Thereafter, the Union engaged in conduct inconsistent with any understanding that the Respondents had assumed the existing RAB contract. Thus, the Union sought to bind the new owners to the Independent Apartment House Agreement or to negotiate an entirely new agreement. Under these circumstances, like the judge, we find that the Respondents and the Union[3] did not

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[3]We do not rely on the judge's analysis of the consequences if the Respondents had assumed the existing RAB contract covering an inappropriate mixed unit of guards and nonguards. See Corporacion de Servicios Legales, 289 NLRB 612, 613 (1988).

We note both the Ebbet's Field and Washbridge units consisted of guards and nonguards. Such units are not appropriate under the Act. Because a successor employer is only obligated to bargain in an appropriate unit, the Respondents had no obligation to continue to recognize or bargain with

actually or constructively assume the existing RAB contract.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Field Bridge Associates and Rachel Bridge Corp., Brooklyn, New York, their officers, agents, successors, and assigns, shall

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the Union in inappropriate units. See Wackenhut Corp., 287 NLRB 374, 376 (1987); Rapid Armored Truck Corp., 281 NLRB 371 fn. 1 (1986).

take the action set forth in the Order.

Dated, Washington, D.C. February 14, 1992

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

John N. Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD
DIVISION JUDGES
NEW YORK BRANCH OFFICE

FIELD BRIDGE ASSOCIATES

and Cases 29-CA-13582
29-CA-13788

LOCAL 32B-32J, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

RACHEL BRIDGE CORP.

Cases 29-CA-13720
and (formerly 2-CA-23014)
29-CA-14230

LOCAL 32B-32J, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

Elias Feuer, Esq., Counsel for the General Counsel.
Manning, Raab, Dealy & Sturm, by Ira A. Sturm Esq., Counsel for the Charging Party.
Kaufman, Frank, Naness, Schneider & Rosensweig, by Martin Gringer, Esq., Counsel for the Respondents.

DECISION

Statement of the Case

Raymond P. Green Administrative Law Judge. This case was tried in New York, New York on December 11 through

14, 1989. The charge in case No.29-CA-13582 was filed on June 14, 1988 against Respondent Field Bridge. The charge in Case No.29-CA-13720 (formerly 2-CA-23014), was filed against Rachel Bridge on August 29, 1988. The Charge in Case No.29-CA-13788 was filed against Field Bridge on November 14, 1988. And the Charge in Case No.2-CA-14230 was filed against Rachel Bridge on July 24, 1989.[1]

On February 27, 1989 the Regional Director for Region 29 issued a Consolidated Complaint against the Respondents in Case Nos. 29-CA-13582, 29-CA-13788 and 29-CA-13720 which was amended on July 27, 1989. On August 29,1989 the Regional Director issued a Complaint in Case No. 29-CA-14230 which was consolidated with the other cases

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[1]All dates are in 1987 unless otherwise indicated.

on November 29, 1989. In Substance, the Consolidated Complaint in the first three cases alleged as follows:

1. That Respondent Field Bridge Associates, on July 1, 1987 executed a contract of sale pursuant to which it, inter alia, agreed to assume the collective bargaining agreement of the seller when Field Bridge purchased a group of apartment buildings called the Ebbet's Field Housing Complex.

2. That Respondent Field Bridge, on July 1, 1987 commenced operating the Ebbet's Field complex, retaining in its employ a majority of the service and maintenance employees and security guards who worked for the seller.

3. That Rachel Bridge Corp., on July 1, 1987 executed a contract of sale pursuant to which it, inter alia, agreed to assume the collective bargaining agreement of the seller when

Rachel Bridge purchased Washbridge Apartments.

4. That Rachel Bridge Corp., on July 1, 1987 commenced operating the Washbridge Apartments retaining in its employ a majority of the service and maintenance employees and security guards who worked for the seller.

5. That both Respondents were successors and that the Respondents violated Section 8(a)(1) & (5) of the act when they refused to remit dues and initiation fees and when, after the collective bargaining agreements expired, they unilaterally failed and refused to continue to make payments to the contractually provided Health and Pension Funds.[2]

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[2]As to dues and initiation fees, the Complaint alleged that the Respondents refused to make such payments from July 20, 1987. In the case of Pension and Health payments, the Complaint alleged that the refusals commenced on August 1, 1987. As to all

6. That since on or about September 22, 1988 and until certain dates set forth in the Order Amending Complaint dated July 27, 1989, the Respondent Field Bridge has refused to reinstate certain of its employees who engaged in a strike and who made unconditional offers to return to work on September 9, 1988.[3]

The Complaint in Case No. 29-CA-14230 alleged that the Respondent Rachel Bridge on April 21, 1989 had violated Section 8(a)(1) & (5) of the

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payments, the Complaint alleged that the Respondents continued to refuse to make such payments from December 14, 1987, a date six months prior to the filing of the unfair labor practice charges.

The Union, however, takes a different position than the General Counsel. It seeks a remedy only from the date of the contract expiration dates on April 21, 1988.

[3]It also is contended that the strike, which commenced on January 12, 1988 was caused and prolonged by the Respondent Field Bridge's unfair labor practices.

Act by unilaterally granting employees a wage increase.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings of Fact[4]

I. Jurisdiction

The Respondents admits and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of

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[4]Both the Charging Party and the General Counsel, prior to the opening of the hearing, made motions to strike certain portions of the Respondents' Answer. In support of these motions, it was argued that the Board was bound to accept as final, the opinions of two State Court Judges in relation to two arbitration cases filed by the Union against the employers. I rejected those motions and reaffirm my earlier conclusions in that regard. My reasons for so doing are set forth in my Order dated July 17, 1989 which is attached hereto as Appendix A.

the Act.

II. Alleged Unfair Labor Practices

a. The sale of the Ebbet's Field and Washbridge Apartment Complexes

There is an apartment building complex known as Ebbet's Field Housing located at 1720 Bedford Avenue, Brooklyn, New York. Previous to 1987 that complex was owned by New Field Housing Co., Inc. which in turn was owned by a company called Cedar York Properties Limited Partnership. In 1984 a company called Arco Management Corp. was hired to be the managing agent of the property and Arco signed an "assent agreement" whereby it (Arco) agreed to be bound to the terms of the master agreement between a multi-employer association called the Realty Advisory Board on Labor Relations (RAB) and the Union. As such, the Union became the collective bargaining representative of certain of

the employees at the Ebbet's Field Housing complex.

There also is another apartment complex known as the Washbridge Apartments located at 1365 St. Nicholas Ave., New York, New York which was owned ultimately by Cedar York. At this site, Arco was also engaged as the managing agent and Arco signed the "assent agreement" on May 2, 1985 whereby it (Arco), agreed to be bound by the terms of the RAB's collective bargaining agreement with the Union.

One of the many peculiarities in this case is that Arco essentially was hired by the New York State Division of Housing in 1984 because of some dispute between the State and the owners. As a result, the equitable owner, Cedar York, neither had control over management nor access to records and documents. Further, because of this

situation, although Arco was signatory to collective bargaining agreements with the Union, the owners of the properties were not privy to those agreements and had not authorized Arco to enter into them on their behalf. Indeed, it appears that neither Cedar York nor the other companies holding title to the properties ever had possession of the relevant collective bargaining agreements.

Both sets of apartment complexes employed service and maintenance employees as well as guards. Pursuant to the assent agreements, the collective bargaining units in both complexes included both guards and non-guards. Moreover, the number of guards in each unit made up almost one half of the bargaining unit employees. In both cases, the employees were employed by Arco and not Cedar York.

The 1985 to April 21, 1988 Apartment Building Agreement between Union and the RAB states at Article IX:

> 1. If there is a bona fide sale or other transfer of title of any member building, or a change of control through a lease, or in the case of a non-corporate ownership, if any person or persons completely divest themselves of ownership or control by any arrangement, the successors in ownership or control, may unless they have other wise indicated their intention not to be bound by this agreement, join the RAB and adopt the contract within 30 days after such acquisition, provided:
>
> (a) The building is not already bound by another agreement.
> (b) Written notice is given to the Union within 5 days after joining the RAB....
>
> * * * * * *
>
> 4. [I]n the event of a change of Employer in a building, the RAB shall use its best efforts to have the succeeding Employer join the RAB and become bound by the terms of this Agreement.
>
> * * * * * *

> Nothing herein contained shall be deemed to limit or diminish in any way the Union's right to enforce this Agreement against any transferee pursuant to applicable law concerning rules of successorship or otherwise...

In 1985 Cedar York sought to sell the two properties and entered into negotiations with the principles of Field Bridge and Rachel Bridge. As Cedar York was not privy to the contracts made by Arco, it sent a letter to the department of Housing (DHCR) on December 1, 1986 requesting among other things, copies of all leases, service contracts and union contracts. The labor agreements and the service agreements were not provided to Cedar York. Therefore the negotiations for the sale of the properties proceeded with some important information unknown to both sides.

On December 4, 1986 a sales contract was executed between Cedar York, Field Bridge and New Bridge for the two properties. The price was 45 million dollars. Later this was reduced to 44 million because the seller could not provide the current financial statements, or any of the agreements that affected the property such as service agreements, labor contracts, or laundry service contracts.

In my opinion, it is important to note that Arco which never had any contract with Cedar York but who was the employer of the affected employees, was not a party involved in the sale of the properties.

The contract of sale dated December 4, 1986 states at pages 3 and 4, inter alia:

> 3. State of Title The Premises are sold and shall be conveyed subject to the following matters:
>
> * * * * * *
>
> (n) All contracts or service agreements relating to the operation or maintenance of the Premises and any renewals or replacements thereof, which shall be assigned to and assumed by the Purchaser on the Closing Date by instrument in the form annexed as Schedule I.

Paragraph 39 to the Contract's rider which was drafted by the buyer's representative, Elliot Gross, states:

> Purchaser acknowledges that Seller makes no representations as to contracts or service agreements relating to the operation or maintenance of the Premises or employees, salaries and benefits, etc. relating to personnel involved in the operation or maintenance of the Premises and that Purchaser will purchase the Premises subject to all of the foregoing as same exist as of the Closing Date.

In an affidavit, Gross stated:

1) I am a general partner in

Fieldbridge Associates with Shalom Drizin, Reuben Schron, Murray Leifer and Jack Gora. I acted as attorney for Fieldbridge in the acquisition of Ebbet's Field Housing Project...

* * * * * *

4) Before signing the contract of sale....we negotiated various changes from the initial draft prepared by the seller. It is my standard practice to seek inclusion in the sales contract a provision that states "There is no agreement in effect between the seller and any union with respect to the building employee or employees and there will be none at closing." (If that is the fact).

5) Mr. Mantel indicated that he could not agree to most of my requests for representations because of lack of knowledge on the operation of the property since the Cedar York people had been ousted by DHCR and were persona non grata. Because of the inability of the seller to make most the requested representations, paragraph 39 was added to the Rider.

6) There was no specific discussion between Mr. Mantel and me about the meaning of

the language "contracts or service agreements" This phrase has a common meaning among real estate practitioners. It would include those agreements which deal with the management and operation of the properties which are the subjects of the transaction such as (1) elevator service, (2) extermination, (3) boiler maintenance, (4) water conditioning, (5) laundry services and (6) union contracts if any.

7) Local 32B was never mentioned during the negotiations of the contract for sale. I was not familiar with the fact that the "customs in respect to title closings adopted by the Real Estate Board of New York Inc." makes direct reference to 32B.

8) Technically a service contract does not include laundry or union contracts, but it is not uncommon to see laundry or union contracts included in such a schedule.

Between December 4, 1986 and the closing which took place over a period of days in late June 1986, there were two modifications in the sales agreement. They dealt with a rent

strike and with potential asbestos problems which might require repairs. No discussion was had between the seller and the buyer as to union agreements or with respect to the wages and benefits for employees.

On June 8, 1987 Arco sent a letter to Mr. Schron a principal of the buyers. This letter which did not refer to an labor agreements with Local 32B-32J, stated:

> [I] is my understanding that you plan to close on Washbridge and Ebbet's Field on June 30th, I am concerned over our management position...
>
> If it is not your intention to retain Arco...to manage the complexes, I would appreciate you notifying me of this. It is unfair to our employees to put them in this position, or to wait until the eleventh hour to let them know where they stand. We could start making arrangements with some of them concerning the continuation of their employment with you or with my firm.

On June 22, 1987 Arco, apparently concerned about the possibility of incurring severance pay liability at the two apartment complexes, sent another letter to Mr. Schron which stated:

> This is to advise you of the terms of the referenced Employer/Union Agreement as it pertains to employee severance/continuation based on a bona fide sale or transfer of title:
>
> If the buyer does not offer employment at existing wages to employees, the seller is responsible for 6 months severance pay to all terminated employees in addition to any other accrued payments.
> The buyer and seller may agree to split severance pay.
>
> The buyer may choose to join RAB and adopt the Agreement in which event, the severance pay will not be required.
>
> If the buyer retains a significant percentage of former employees, the NLRB may appoint the current union as the bargaining agents for the employees even if they have been severed by the

seller.

The above information was obtained from the Union Agreement and the opinion of RAB's attorney.

The closing for the two properties required several days from June 25 to July 2, 1987. According to a Mr. Junghuns, the attorney representing the seller, the intention was that all outstanding agreements relating to the properties, including labor agreements were to be assumed by the buyers. There is however, nothing in writing to explicitly indicate this intention. However, given the statements in the Gross affidavit, it may very well be that the buyers, (you should pardon the expression), were buying a pig in a poke.

As in the case of the initial sales contract, Arco was not privy to, nor did participate in the transfer of the properties. Also, at no time prior

to the closing did the Union either participate in the transactions or attempt to contact the buyers.

On or about July 1, 1987 title to the two properties transferred from Cedar York to the purchasers. The parties agree that the following facts are not in dispute.

1. As of July 1, all of the employees at both projects, including both service and maintenance employees as well as guards, were retained by the new owners and they continued to do the same work and receive the same hourly wage rates, sick leave, vacation, and holiday benefits. It is agreed that the security guards at both apartment complexes were guards as defined in Section 9(b)(3) of the Act.

2. Since July 1, 1987 neither respondent has remitted union dues to the Union. (The evidence indicates that

at Washbridge, Rachel Bridge has continued to deduct dues but has not remitted them to the Union).

3. Field Bridge, since July 1, 1987, has failed and refused to make contributions to the health fund and pension fund for employees at Ebbet's Field.

4. Rachel Bridge since August 1, 1987 has failed and refused to make contributions to the health fund and pension fund for the employees at the Washbridge apartments.

5. At the time of the takeover, there were about 69 employees in the Field Bridge unit, (Ebbet's Field), of which 24 to 27 were security guards.

6. At the time of takeover, there were about 61 employees in the Rachel Bridge unit, (Washbridge), of which about half were security guards.

7. Between July 1, 1987 and August

1, 1987 at Washbridge, Arco continued to manage the buildings.

b. Events subsequent to the Sale

At the Washbridge Apartments, Arco was kept on as the Managing agent for a short period of time. According to Vosel Autzon, the site manager at Washbridge, there was a meeting between ARCO and Rachel Bridge on July 7, 1987 at which Jeffrey Goldstein, president of ARCO said that he had contracts with the union and thought he could obtain certain cost saving measures for the new owners. As a result of this meeting, Rachel Bridge asked ARCO to send a letter to the Union and such a letter was sent on August 31, 1987. This read:

> The new Owner of the building has asked me to meet with you to discuss the following items that we would like you to bring to the attention of the proper persons at Local 32B-J.

> 1) Since Arco...has been the managing agent, two Porters have been added to the ranks of our union contract. We are presently asking for those two Porters to be removed from employment to reverse us back to the normal size of our union contract. These two porters were added since the 1983 contract was negotiated.
>
> 2) The new Owners...are requesting a reduction in staff of 9 persons. It is agreed by this management company that the maintenance and cleaning staff at Washbridge Apartments is overstaffed by nine persons and a reduction of these persons would not decrease the services to the tenants. We would reduce the staff by attrition.

At the Washbridge Apartments, the evidence shows that for the month of July, 1987 monies for pension and welfare were deducted from employees earnings and remitted to the Union. However, there later arose a dispute between Rachel Bridge and Arco as to the latter's authority to make such payments, with Rachel Bridge

maintaining that those payments were unauthorized and invalid. There also is evidence that at least for the security personnel at Washbridge, the Respondent conferred with the Union regarding a number of disciplinary and other personnel matters during the months of August, September and October 1987. Thus, there is some indication as evidenced by memoranda, that Rachel Bridge was operating Washbridge under the assumption that the previous union contract placed some limitations on its discretion.

The situation at the Ebbet's Field Apartments in the period immediately after the sale was somewhat different, one reason being that Arco was not retained there. Thus, unlike at Washbridge, the Respondent at Ebbet's Field as of July 1, 1987, not only ceased remitting union dues but also

stopped remitting money to the Union's pension and welfare plans.

Union representative Larry McGowan testified that in July 1987 he met with Field Bridge representatives Klien and Safrin at Ebbet's Field. He states that when he got there Safrin said; "The union finds out quick; already you're here." McGowan states that he mentioned that we would like to have them sign a contract eventually but that this could be discussed at a later date.

According to McGowan he again spoke with Safrin in mid August 1987 and told Safrin that he would like to bring down a contract for signature. McGowan states that when he delivered the contract a day or two later, he told Safrin that there was no pressure to sign it right then; that he should have his attorney look it over and get

back to him in a couple of weeks. According to McGowan, Safrin said that he would go over it with the attorney and that the company's principals would sign it.

It is noted that the contract tendered by McGowan to Safrin for Ebbet's Field, was not the RAB agreement that Arco had previously assented to. Rather, it was the Independent Apartment House Agreement.

Later in August 1987, McGowan called Safrin to let him know that there was an arbitration hearing scheduled relating to the discharge of an employee by Arco prior to the transfer on July 1. According to McGowan, he also asked what was happening with the contract and that Safrin told him not to worry, that it would be signed.

On September 18, 1987 the Union in

relation to the arbitration case, sought to add Field Bridge as a party to that proceeding.

On October 29, 1987 the Union sent a letter to Rachel Bridge (Washbridge Apartments), enclosing a copy of the Independent Apartment House Agreement. (Not the RAB agreement). The letter read:

> The enclosed agreement is the standard industry-wide collective bargaining agreement. This agreement has already been negotiated and, accordingly, is not a proposal. You are being offered the opportunity to enter the enclosed agreement with the Union. In the event that you wish to avail yourself of this opportunity, please sign both of the enclosed agreements and return them to the Union. Upon receipt of same, we shall return a fully executed copy to you.
>
> In the event you do not wish to avail yourself of this agreement, please advise and we will arrange for the commencement of negotiations and will submit written proposals for a new

collective bargaining agreement.

On December 1, 1987 the Union wrote to the Office of the Contract Arbitrator seeking to amend a pending arbitration case against the prior owners and Arco to add Rachel Bridge as a party. Thereafter, on February 4, 1988 the Union sought arbitration against Rachel Bridge under the RAB contract for laying off the guards. In relation to these actions, the company sought to enjoin the arbitrations in State Court. However, in the case of Rachel Bridge, Judge Moskowitz seemingly accepted the Union's contention that Rachel Bridge had assumed the predecessor's contract and she refused to stay the arbitrations.

On August 11, 1988 Rachel Bridge's new attorney, Martin Gringer sent a letter to Sturm regarding the Washbridge Apartments. This read:

As you also are aware, my client has taken the position that it did not assume any collective bargaining agreement in effect when it purchased Washbridge Apartments in July, 1987. This issue is presently being litigated in the state courts. Inasmuch as the parties have been unable to agree upon the terms of a collective bargaining agreement, my client would have the right under the...agreement to provide ten days written notice to cancel any prior agreement, if it had assumed such a contract. This letter constitutes ten days' notice of such cancellation of any collective bargaining agreement that may exist between the parties. This notice of cancellation is without prejudice to my client's position that it has not assumed the...agreement.

It is also my understanding that on or about August 31, 1987 my client gave notice tot he Union that it did not recognize it as the collective bargaining agent for guards an security personnel employed at Washbridge Apartments. In the event, however, that a court or government agency ultimately finds that there was a contract in existence at any time, this letter

shall constitute notice that my client wishes to withdraw any recognition of the Union as the representative of guards or security personnel upon the expiration of any contract that may be ultimately held to have existed.

c. The Negotiations and Strike at Washbridge Apartments

As noted above, the Union on October 29, 1987 tendered to Rachel Bridge, a copy of the Independent Apartment House Agreement.

According to Rachel Bridge's site manager, Vosel Autzon, a meeting was held on November 24, 1987 at the offices of the company's attorney Joseph Reichbart. Autzon testified that Reichbart said that the company was willing to negotiate but needed relief including: (1) Reduction of the maintenance staff; (2) Elimination from any contract of the security staff; and (3) Absolution from any prior arbitrations involving the prior

owners. He states that the Union took the position that they didn't bargain away men and that they wanted the company to sign the Independent as opposed to the RAB contract. According to Autzon, the Union stated that the company could not get the RAB contract because the 30 period had run. He testified that no one from the Union took the position that the company had assumed the predecessor's RAB contract.

On December 18, 1987 the Union sent a letter to the Office of the Contract Arbitrator reading in pertinent part:

> Our firm represents Local 32B-32J...New Bridge Housing Co., Inc. by its agent Arco...has assented to be covered by the 1985 Apartment Building Agreement between the Union and the Realty Advisory Board...
>
> A dispute has arisen concerning the Employer's failure to honor Article IX of the Agreement, when it, in or around June, 1987 sold the

> premises to an entity, Rachel Bridge Associates. This entity did not employ the building service employees at the then existing wages, hours, and working conditions. In addition, the successor has failed to cover any employees with medical insurance, pension coverage, or pre-paid legal services.
>
> As a result of the above, the Union will seek as a remedy damages of severance pay for each unit employee of six months pay, contributions, plus liquidated damages and interest to the respective Funds, and such other relief as the arbitrator seems just and proper.

Like the similar letter sent on December 17 regarding Ebbet's Field, the Union named the parties as being New Bridge, (the old owner), Arco and the RAB.

On January 7, 1988 Rachel Bridge subcontracted out the security guard work at the Washbridge Apartments.

On January 13, 1988 the service and maintenance employees at Washbridge commenced a strike. After the strike

commenced a meeting was held between the Union and the employer. According to Autzon, attorney Reichbart asked if the Union would let the men work while negotiations were going on. He states that the Union's attorney, Sturm said that they would not call off strike until they got a signed agreement, that he was not willing to accept the company's prior proposals and that he would bring in the Union's proposal on the following morning. According to Autzon, when Reichbart asked for contract similar to the RAB contract but with concessions, Sturm said the company could have the RAB contract and thereafter ask for reductions.

According to Autzon, on January 14, the Union presented its contract proposal which called for a large wage increase. He states that when the company said that the proposal was

preposterous, Sturm said the increase was from savings derived from letting the security people go.

On the afternoon of January 14, 1988 the strikers at Washbridge returned to work. Union agent Pizzaro told Autzon that the Union was willing to negotiate with a deadline of January 25, while the men worked.

On January 15, 1988 Reichbart sent a letter to the union reading:

> We wish to state that management is willing to commence immediate negotiations and attempt to conclude a collective bargaining agreement on or before January 25, 1988 provided the Union meets promptly and continuing with management...
>
> We reiterate that management is willing to abide by all of the conditions of the Union's contract with the...RAB, which is expiring in April, 1988 and is willing to abide by whatever contract is negotiated by the Union and the RAB for any period after April 21, 1988 on a one year basis or a three year basis.

Management also takes the position: (1) that the maintenance employees constitute a unit of 27 full-time employees; and (2) management will not be responsible for an pending or other arbitrations arising from any incidents prior to July 1, 1987, the date of the passage of title from the previous Seller...

Management will pay all dues and benefits under the Union's contract with the RAB as we understand them, retroactive to that date.

Management also takes the position that a request or a bargaining demand which has been made...for a general wage increase...of $1.50...from which the Union refused to budge...is not evidence of bargaining in good faith....

If there is no substantial movement from that position...to attempt to make an "example" of this employer as had been stated by the Union representatives, management will withdraw any offers...and seek a 10%reduction in all wages and other conditions of employment.

d. Negotiations with Field Bridge regarding Ebbet's Field

In November 1987 Chuck Ellman, a labor consultant retained by Field Bridge, contacted union representative Kevin McCulloch and said that he wanted to negotiate for a contract covering the employees at the Ebbet's Field project. He states that McCulloch referred him to Serge Jean-Jacques the Union's district manager whereupon a meeting was arranged at the Union's office for December 1, 1987.

According to Ellman, at the meeting on December 1, 1987 he said that the company wanted to negotiate a contract excluding guards. According to Ellman, the Union's attorney Ira Sturm said that although he was unhappy with the company's position, he understood that under the law the Union was not entitled to recognition in a mixed unit. Ellman states that Sturm

said that there were 3 types of contracts to choose from: 1) the RAB contract; 2) the independent industry agreement; and 3) a new contract negotiated from scratch. According to Ellman, Mr. Sturm asked the union representatives if Field Bridge had ever signed an assumption or assent agreement and the Union agents acknowledged that the only assent agreement they had in their records was one signed by Arco in 1985 for Ebbet's Field. According to Ellman, when the Union pointed out that the employer was deducting union dues, he responded that when the payroll records maintained by Arco's computer company were transferred, the deductions were automatically made and it was the employer's intention to return the dues to the employees. Ellman states that when Sturm asked if the new employer

had made any plans with respect to security guards, he replied that the company was looking to subcontract this work to an outside guard company. He states that Sturm suggested that the company consider either hiring a guard service already under contract with the Union or a guard service that would agree to hire the existing guards. According to Ellman, he agreed to provide a copy of the purchasing agreement when it was requested by Sturm.

On December 17, 1987 Field Bridge subcontracted out the security guard work. At this time there were 23 security guards employed at Ebbet's Field.

Also on December 17, 1987 the Union's attorney sent a letter to the RAB Office of the Contract Arbitrator reading:

Our firm represents Local 32B-32J....New Field Housing Co., Inc. by its agent Arco Management Corp., has assented to be covered by the 1985 Apartment Building Agreement between the Union and the Realty Advisory Board...for its employees at 1720 Bedford Avenue.

Said Agreement provides for the submission of disputes to the Office of the Contract Arbitrator.

A dispute has arisen concerning the Employer's failure to honor Article IX of the Agreement, when it, in or around June 1987, sold the premises to an entity, Field Bridge Associates. This entity did not employ the building service employees at the then existing wages, hours, and working conditions. In addition, the successor has laid off approximately 25 unit employees and failed to cover any employees with medical insurance, pension coverage, or pre-paid legal services.

As a result of the above, the Union will seek as a remedy damages of wages for the 25 laid-off employees for the duration of the collective bargaining agreement, severance pay for each unit employee of six months pay, contributions, plus

> liquidated damages and interest to the respective Funds, and such other and further relief....

In the above quoted letter, the Union asserted that the parties were the old owner, New Field Housing Co. Inc., the old manager Arco and the Realty Advisory Board. Field Bridge the new owner, was not named by the Union as one of the parties.

Ellman testified that at a meeting on December 22, 1987 Sturm said that the company no longer had the option of having the RAB Agreement because that contract required a purchaser to agree to assume the RAB contract within 30 days of a closing. According to Ellman, Sturm said that the Union wanted the Independent Agreement, excluding guards, retroactive to the date of purchase. Ellman states that Sturm said that because the company was saving money by subcontracting out the

guard work, this money should be given to the remaining employees. Ellman states that Sturm also said that he had obtained a copy of the purchase agreement from the seller and that he thought he could make out an argument that the buyer had assumed the RAB contract.

On January 11, 1988 an internal memorandum was sent from McCulloch to Donald Mumm regarding both apartment complexes This read:

> President Bevona met with me on January 8, 1988 and instructed me to issue strike authorization for the above two buildings. We are to strike only with the maintenance employees and use regular on-strike signs.
>
> The security guards should not assist in the picketing and should not become involved in the strike in any way...

At Ebbet's Field the strike began on January 12, 1988. The service and maintenance employees who participated

in the strike were told by union agent LaRosa that they were going on strike because the company was not making payments to the health fund, was not remitting dues, and was not honoring the contract. According, to LaRosa, he also told the employees that the strike was to get the company to the bargaining table to negotiate. The picket signs read, "On Strike".

In response to the strike, Field Bridge entered into a verbal arrangement with M&M Maintenance Corporation to provide service and maintenance work at the Ebbet's Field site. This subcontracting agreement was terminable at will at the option of either party. (This did not apply to Rachel Bridge).

The Union tendered a contract proposal to Field Bridge on January 14. By its terms, it is clear that this

time the Union was seeking to negotiate a new contract and was not seeking to bind the Respondent to the Arco's agreement. In this regard, Ellman states that Sturm said that the Union no longer wanted the existing Independent Contract, but wanted to set new industry standards. (The RAB contract was to expire in April 1988, 4 months away). Ellman states that he said that the company would agree to any proposals that the Union wanted so long as the Union agreed that the company would get same as what ultimately was agreed to between the Union and RAB. According to Ellman, when the Union refused, the company made a proposal for a reduced wage increase and for retroactivity. No agreement was reached.

On January 14, or 15, 1988, the Union sent a newsletter to the

residents of Ebbet's Field indicating the Union's position regarding the strike.

> On or about July 1, 1987 New Field Housing purchased.... the complex known as Ebbet's Field Housing. Since the closing, the new owner stated that they wanted it strictly understood that they would never assume the contract with Local 32B-32J covering the long-term maintenance and security employees. They made it perfectly clear that it was their intention to drastically reduce the wages and benefits of the security personnel who had been employed at this housing development for approximately 30 years.
>
> They then proceeded to demonstrate the absurdity of this statement by engaging SSI Security who brought in new guards and reduced the former wage scale in excess of one-half.
>
> After negotiating for several months, and after seeing what had happened to the security guards, the Union in anticipation of the same callous disregard for the maintenance employees, had no alternative but to strike the housing development....

On January 28, Field Bridge sent letters to its employees reading:

> We have become aware that our payroll dept. has made improper deductions from hour wages. Enclosed you will find repayment of those improper deductions, along with accumulated interest.

On February 16, 1988, Field Bridge obtained an Order To Show Cause in a New York Court seeking to stay the previously described arbitration hearing. As noted above, the Union had sought to add Field Bridge as a party to a grievance that had arisen before it took over the property. On April 26, Judge Gammerman, apparently agreed with the Union's contention that Field Bridge had assumed the RAB contract, and issued an oral Order refusing to stay the arbitration. In this regard, it seems to me that the first time that the Union seriously contended that either Field Bridge or Rachel Bridge had assumed the RAB contract was during

the Court proceeding.

On March 3, 1988 Ellman sent a letter to the Union notifying it that the employer contemplated permanently subcontracting out all janitorial/porter work at Ebbet's Field.

On April 21, 1988 the contract between the Union and the RAB expired.

On May 6, 1988 Ellman sent a mailgram to Sturm regarding the Ebbet's Field Apartments as follows:

> Pursuant to Article XVIII of the expired RAB contract with...Local 32B-J, for the employer we herein demand to immediately meet to negotiate a successor agreement. This notice is given based upon the recent decision in New York State Supreme Court. It should not be construed as a waiver by the employer of any statutory or procedural recourse available to it.

On May 9, 1988 the Union sent a letter to the contract arbitrator setting forth alleged contract breaches

by Field Bridge including:

> On or about December 17, 1987 the employer in violation of Article IV of the Agreement discharged its security employees without giving them a written statement setting forth the reasons for the discharge.

At an arbitration hearing held on February 15, 1989, the Union took the position that it sought backpay for the guards at the contract rate through the expiration date of the contract and reinstatement by Field Bridge to their former jobs.

On June 10, 1988 Martin Gringer sent the following letter to Ira Sturm.

> This office now represents Field Bridge...in its....negotiations with Local 32B-32J. As you are aware, my client has taken the position that it did not assume any collective bargaining agreement in effect when it purchased Ebbet's Field Apartments in July, 1987...Inasmuch as the parties have been unable to agree upon the terms of a collective bargaining agreement, my client would

have the right under the...agreement to provide ten days written notice to cancel any prior agreement, if it had assumed such a contract. This letter constitutes ten days' notice of such cancellation...This notice of cancellation is without prejudice to my client's position that it has not assumed the...agreement.

It is also my understanding that on or about December 1, 1987 my client gave notice to the Union that it did not recognize it as the collective bargaining agent for guards and security personnel employed at Ebbet's Field Apartment. In the event, however, that a court or government agency ultimately finds that there was a contract in existence at any time, this letter shall constitute notice that my client wishes to withdraw any recognition of the Union as the representative of guards or security personnel upon the expiration of any contract that may be ultimately held to have existed.

On June 1, 1988 Sturm replied:

The Union's position is that the Employer cannot have it both ways. Either there was an assumption of the

> Agreement, in which event the parties are obligated to bargain to impasse prior to any unilateral changes, or there was no assumption in which case the parties are merely obligated to bargain based upon the recognition by your client of the Union.
>
> I am not aware of any provision allowing your client ten days to cancel an agreement it does not recognize. Your client must first recognize the existence of the agreement before it can exercise options thereunder.

e. The Issue Relating to Reinstatement of the Strikers at Ebbet's Field

In the beginning of September 1988 all of the strikers at Ebbet's Field asked to go back to work.

On September 22, 1988 Field Bridge sent the following letter:

> I am in receipt of your request for reinstatement. Unfortunately, we are not in a position to offer any striking employees reinstatement until such time a union agreement has been reached....

The above letter was sent to

employees Bolivar Arias, Ryland Barrett, Anthony Brown, Manuel Carvatal, Anthony DeChiara, Edward Doyle, Elbert Escan, Juan Escano, Robert Hurst, Richard King, Andre LaRochel, Arthur LeGros, Raphael Louis, Russell Minnifield, Johnson Pettway, Arnold Pinder, George Rapley, Omar Redman, Maceo Stephens, Fest Thorne, Roosevelt Townsend and Jose Zuna.

Also on September 22, 1988, Field Bridge sent a different letter to employees James Eillis, Owen Hackett, Oakley Harvey, McKinley King and Fraiser Townsend. This read:

> I am in receipt of your request for reinstatement. Unfortunately, when the strike began, a permanent replacement was hired to take your place. However, your name has been put on a preferential hiring list. If and when a vacancy occurs, you will be given first consideration for employment provided a union agreement has been reached by that time....

On April 10 and May 5, 1989, Field Bridge offered reinstatement by letter reading:

> Please be advised that you are immediately reinstated to your previous position of employment with Field Bridge Associates. Please contact the undersigned so that we may schedule your return to work.
>
> If we do not hear from you within two weeks of the date of letter, we will assume you are not interested in returning to work.

Copies of the April 10 letter was sent to Edward Doyle, Arthur LeGros, Raphael Louis, Russell Minnifield and Arnold Pinder.

Copies of the May 5 letters were sent to Ryland Barrett, Juan Escano, Robert Hurst, Andre LaRochel and Frasier Townsend.

The evidence shows that the employees who returned to work in response to the April 10 offer, were

told that they were to be employed by the maintenance subcontractor, M & M[5] As a result, at least one, (Arnold Pinder), refused to accept such employment and he ultimately was offered re-employment on the payroll of Field Bridge.

On May 5, 1989 attorney Gringer wrote to Sturm regarding the offers of reinstatement as follows:

> [T]his is to confirm that the strikes who had been offered reinstatement and who will be offered reinstatement are being offered employment at the same terms and conditions of employment that were in effect at the time the strike commenced. No employee is required to sign my document as a condition of reinstatement. Moreover, any employee who objects to being on the M&M payroll may be put on the Field Bridge payroll.

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5. According to employees Robert Hurst, who returned to work and was put on the payroll of M & M, he returned to the same job, with the same pay and the same hours. He says that M & M made him work harder than he had worked previously.

On May 11, Sturm replied:

> I appreciate the fact that you have intervened in connection with the impropriety of the original offers. I would further appreciate it, if your client could advise those who were offered reinstatement, that the prior preconditions of employment have been removed and that they will be employees of Field Bridge and not M&M.

Thereafter on May 23, Field Bridge sent letters to employees Doyle, Minnifield and Pinder reading:

> This is to clarify any possible misunderstanding concerning our previous offer of reinstatement. If you desire, you may return to work on the Field Bridge payroll. Moreover, you are not required to sign any document as a precondition of returning.
>
> You are being offered reinstatement pursuant to the same terms and conditions of employment in existence at the time the strike began in January 1988.

On July 24, 1989 Field Bridge sent letters to Arias Bolivar, Anthony

Brown, Edward Doyle, Juan Escano, Owen Hackett, Andre LaRochel, Arthur LeGros, Raphael Louis, Jose Luna, Russell Minnifield, Arnold Pinder, George Rapley and Fest Thorne. These read:

> Please be advised that your prior request for unconditional reinstatement or substantially equivalent employment at Ebbet's Field Apartments is granted. Please contact the undersigned...to arrange for your return to work.
>
> If we do not hear from you within two weeks of the date of this letter, we will assume you are not interested in returning to work.

Notwithstanding the offers of reinstatement described above, a number of the strikers never received any offers of reinstatement. These were Manuel, Carvatal, Anthony DeChiara, James H. Ellis, Oakley Harvey, McKinley King, Richard King, Johnson Pettway, Omar Redman, Maceo Stephens and Roosevelt Townsend.

f. Alleged Unilateral Wage Increases

The evidence in support of this allegation shows at most, that in April 1989 Rachel gave wage increases to its employees in amounts similar or identical to those negotiated between the Union and the Realty Advisory Board. The record does not indicate the state of negotiations between this Respondent and the Union after January 15, 1988 not does it indicate a failure to give notice to the Union. There is no evidence that the Union sought to bargain with Rachel Bridge after January 15, or that sought to negotiate with respect these particular wage increases. On the whole, it is my opinion that the evidence is singularly lacking to make out a prima facie case in relation to this allegation.

III Analysis

a. The Refusal To Bargain Issues

The Complaints allege that both Respondents are successors to the previous owners and have incurred the duty to recognize the Union. The Complaints go further and allege that the Respondents adopted or assumed the predecessors' contracts with the Union and therefore are legally bound to honor the terms and conditions of those collective bargaining agreements. In this respect, the Complaints allege that the Respondents violated Section 8(a)(5) of the Act by refusing to remit to the Union dues and initiation fees, and by failing to make payments required by the contracts to Pension and Health Care funds. In essence, the General Counsel's case is that when the Respondents on July 1, 1988 took over the properties, they had agreed to the

terms of the respective collective bargaining agreements but then, (almost immediately), breached those agreements by failing and refusing to honor their terms.

The Union also bases its contentions on the theory that the Respondents assumed the collective bargaining agreements. However, the Union unlike the General Counsel, argues that it "is seeking in this case a remedy only from the date of the expiration of the collective bargaining agreements to wit, April 21, 1988." Thus the Union's position is that the Board should not grant any monetary relief for any period up to April 21, 1988 inasmuch as that relief was sought through arbitration.[6]

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[6] The Union also asserted that the Respondents should be bound to the previous collective bargaining agreements as a matter of law, because they "merely purchased the assets" of

Both the General Counsel and the Union take the position that insofar as the "assumption" question, the Board should be bound by the findings and conclusions of the State Court. They argue that I need not trouble myself with the factual or legal questions surrounding the events leading up to the sale and transfer of the properties, those issues having been decided in another forum. As I have already indicated I rejected this argument for the reasons set forth in

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the predecessor. This argument is rejected. The evidence shows that the sale of these properties involved an arms length transaction and that the new owners had no connection with the prior ownership. At most, the new owners might be considered as successors but this is not a situation where an alter ego was created or where the pre-existing company has continued to exist in only slightly modified form. (For example through a stock transfer). Cf. McAllister Bros., 278 NLRB 601 enfd. 819 F.2d 439 (4th Cir. 1987); EPE v. NLRB 845 F.2d 483 (4th Cir. 1988).

Appendix A. Unfortunately, it seems that I must come to grips with the facts, evidence, and legal principals relating to this odd and perhaps unique set of circumstances.

Assuming for the moment that the Respondents should be considered "successors" under the test of Fall River Dveing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987), a successor generally has no obligation to honor the predecessor's labor contract and may establish initial terms and conditions unilaterally. Thus in Saks & Company v. NLRB 105 LRRM 3274 (2nd Cir. 1980). The Court stated:

> A successor employer ordinarily may establish initial terms and conditions of employment without bargaining with the incumbent union...the NLRB relied on a narrow exception articulated by the Court in Burns,....Under that exception as developed by the NLRB, a successor employer is required to bargain with

> respect to initial terms only if it is perfectly clear that it plans to retain all the employees in the predecessor unit and hires those employees in a manner which leads them to believe that they will hire on the terms and conditions that existed under the predecessor employer...

In NLRB v. Burns Int'l Security Services, 406 U.S. 272 (1972) the Court stated:

> We also agree...that holding either the Union or the new employer bound to the substantive terms of an old collective bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the term...contained in the old....contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling

> to make to a large or economically successful firm...
>
> In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the Union but also to observe the pre-existing contract rather than to face uncertainty and turmoil. Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed that the obligation under the old contract...

As made clear by the Court in Burns supra, a successor may be bound to the predecessor's labor agreement if the successor assumes it. However, it is equally clear that the assumption can only come about as a bilateral agreement, evidenced either by a writing or by the conduct of both parties. That is, the agreement must be a mutual one because a union may not wish to be bound to a contract

previously made with an unhealthy predecessor and any want to bargain anew with the new enterprise.

In the present case it is contended that Rachel Bridge and Field Bridge assumed the predecessor's collective bargaining agreements. They point to the contract of sale executed in December 1986 and to the alleged continued application of the contracts' terms for a period of time after July 1, 1987 when the properties were transferred. I do not agree.

The previous collective bargaining agreements covering the employees of the two properties was the RAB association wide contract assented to by Arco Management Corp., which was the involuntary managing agent of the properties for the owner, Cedar York. That is, Arco had been placed in the position of managing the properties by

the State of New York over the objections of the owners because of a dispute between the State and Cedar York. Thus, the owner of the properties was neither party to nor privy to the collective bargaining agreement. When negotiations took place between Cedar York and the Respondents, the terms of the collective bargaining agreement were not known to either the seller or the prospective buyers. Arco and the Union did not play any role in the sale.

Assuming that the Respondents in the December 4, 1986 contract of sale, indicated an intention of adopting "all contracts or service agreements," and even assuming that this was understood as including the labor contracts, it is clear that when this contract was made and when the properties were transferred, neither the Union nor Arco

were parties to the transaction. Therefore, any agreement that the Respondents made with Cedar York regarding a collective bargaining agreement is essentially meaningless because Cedar York was not a party to the collective bargaining agreement.

Further, after the properties transferred on July 1, 1987, the evidence shows, that the Union did not, until much later, seek to bind the Respondents to the terms and conditions of the existing RAB contract. Rather, the evidence show that when the Respondents agreed to bargain with the Union, (for the service and maintenance employees only), the Union sought new and different contracts. Additionally, the Union, in effect, acknowledged the non viability of the RAB contract vis a vis the Respondents by statements indicating that the bargaining units

would have to be drastically altered. (In fact cut in half, because about 50% of the bargaining unit employees of both Respondents at the time of the sale, consisted of guards). Thus by its actions it is evident to me that the Union did not agree to any "assumption" of the pre-existing labor agreements. As I have concluded that an agreement to assume a contract must be by mutual consent, I conclude that no such "assumption" took place in the instant case.

However, assuming for argument's sake that an assumption did take place, there would still be an overriding defect in the General Counsel's case. If, as contended, the Respondents assumed the RAB contract, that contract would not be enforceable under the provisions of this Act because the bargaining unit on its face, included

both guards and non guards. Moreover, the inclusion of guards consisted of about half of the bargaining unit employees in both cases.

Section 9(b)(3) of the Act provides in pertinent part:

> [T]he Board shall not...decide that any unit is appropriate for such purposes [collective bargaining], if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

In Supreme Sugar Company Inc., 258 NLRB 243, 245 (1981), the ALJ dismissed an 8(a)(5) Complaint alleging the failure to honor a contract vis a vis

watchmen, in view of his conclusions that despite a long history of bargaining, the watchmen were guards as defined in Section 9(b)(3) of the Act.

In Wells Fargo Corp., 270 NLRB 787, 789 (1984), the employer withdrew recognition from a union representing guards and non guards. The withdrawal of recognition involved a bargaining unit of guards and recognition had originally been accorded on a voluntary basis. The Board dismissed the Complaint and stated:

> Finally we turn to the judge's conclusion that the Respondent should be "estopped" from withdrawing recognition because it had previously extended recognition to the Union. In so concluding, the judge relied on International Telephone & Telegraph Corp., (159 NLRB 1757, [1966] enfd. as modified 383 F.2d 366 (3rd Cir. 1967). In ITT, a Board majority held that an employer was "estopped" from withdrawing recognition from a union which it had voluntarily recognized for 13

years in a mixed unit of professional and nonprofessional employees notwithstanding the fact that the professional employees had never voted in self-determination election as required by Section 9(b)(1) of the Act. In finding a violation....the Board noted the consensual nature of the parties' relationship but also noted their long bargaining history and the fact that the withdrawal occurred in a context of other remedied unfair labor practices. Here by contrast, the parties' relationship was less than 1 year old when recognition was withdrawn in a context free of other unfair labor practices.

In reaching its conclusion, the Board in ITT further noted that its holding was "not to be construed as foreclosing the professionals in the unit from seeking [a] self-determination [election] at an appropriate time.....In Utah Power, however, the Board determined that the professional employees were not precluded from asserting their statutory rights to a self-determination election although they had accepted their situation for 43 years. In so finding, the Board distinguished ITT and noted

> that the proceeding in Utah Power "was initiated at an appropriate time by professional employees under a provision intended for their protection." Contrary to the judge, we concluded that here the Respondent was not estopped from withdrawing recognition from the Union because the estoppel theory, as shown in Utah Power, does not operate to preclude the intended beneficiary of the statute from asserting rights thereunder. Inasmuch as the Respondent obviously belongs to the class which is the intended beneficiary of Section 9(b)(3), it was not estopped from asserting its rights under that section by refusing to bargain with the Union when it did.
>
> In sum, while we agree that the Respondent and the Union could enter into a valid voluntary collective bargaining relationship, we find that the Respondent was privileged to withdraw from the relationship at the time it chose to so do...

It is argued that I should follow New York Times 270 NLRB 1267, 1272 (1984) and find an 8(a)(5) violation while at the same time modifying the

bargaining unit to exclude the guards. However, the case is substantially distinguishable from the present case. In New York Times, the company was held to have violated Section 8(a)(5) by withdrawing recognition in relation to a group of nonguard employees who had been transferred to other jobs. As part of its defense, the employer claimed that a long standing bargaining unit was defective because out of approximately 1500 employees, about 30 were guards. There was however, a real dispute as to the status of the 30 individuals and that dispute was pending before the Board pursuant to a unit clarification petition. To my mind this is very different from the situation in the present case, where the contract to which the Union wants to bind the employer is, on its face, for a prohibited unit of guards and non

guards. Also, unlike the New York Times case, the bargaining units here consisted of an equal number of guards and non guards.

In short, the theory of the Complaint is that the Respondents assumed collective bargaining agreements which they thereafter breached. In my opinion the Respondents and the Union did not agree to assume the previous contracts. Moreover, I conclude that even if they did, the contracts were fatally flawed as they included guards and non guards in the bargaining units.

Having concluded that the Respondents had no obligation to honor the terms and conditions of collective bargaining agreements, it follows that the strikes against Field Bridge and Rachel Bridge were economic and not unfair labor practices strikes.

As the strike at Rachel Bridge terminated almost immediately, the only issue in the present case, is whether Field Bridge violated the Act by refusing to reinstate the Ebbet's Field strikers upon their unconditional offers to return to work.[7]

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[7] Field Bridge asserts it had no obligation to reinstate the strikers because the strike was an unprotected rather than an economic or unfair labor practice strike. It argues that the strike was unprotected because it was in breach of a no strike clause. I can't take this argument seriously as the Respondent also argues that there was no contract between it and the Union. Having concluded that the Respondent did not assume the contract, it follows that there did not exist a no strike clause to be breached. It also argues that the strikers engaged in unprotected activity because the picketing violated Section 8(b)(7) in that the Union was seeking recognition in a unit of guards and non guards. This is also rejected. First, the company did not file an 8(b)(7) charge. Second, while the Union may have sought reinstatement for the guards, the company has not, in my opinion met its burden of establishing that the Union via its picketing, sought initial recognition in such a unit. Rather, the evidence suggests that the Union was willing to bargain in a unit

Economic strikers retain their status as employees and are entitled to reinstatement upon their unconditional offers to return to work. Failure to offer such strikers immediate reinstatement will constitute a violation of Section 8(a)(3) of the Act unless the employer has substantial and legitimate business justifications for refusing to put them back to their former jobs. Even where permanent replacements have been hired during a strike, the employer must, upon a

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consisting only of the service and maintenance employees for whom recognition had been granted. Third, the company never indicated to the striking employees or to their union that it viewed their picketing as being violative of 8(b)(7). Indeed, after the company ended the lockout, it offered to reinstate most of the strikers, an action which in my opinion constituted a waiver of this contention. This is viewed as analogous to cases under Section 8(d) and 8(g) where an employer cedes the contention that strikers lost their employee status once they are reinstated.

striker's unconditional offer to return to work, offer such reinstatement when vacancies occur unless the strikers in the meantime "acquired regular and substantially equivalent employment. The Laidlaw Corporation 171 NLRB 1366 (1968). In circumstances where the employer has refused to reinstate strikers who have made unconditional offers to return to work, it is the employer who has the burden of proof that its failure to offer reinstatement was justified. See also Bralco Metals Inc., 227 NLRB 973, 977 (1977).

In the present case the strikers made unconditional offers to return to work in September 1988. In response, Field Bridge sent letters stating that it would not offer reinstatement until a union agreement was reached. The Respondent asserts that it thereby locked out the employees at this point

and that such an offensive lockout therefore constituted a substantial and legitimate business justification for refusing to reinstate the strikers. I agree.

In American Ship Building v. NLRB, 380 U.S. 300 (1965) the Court held that the employer did not violate 8(a)(1) or (3) by locking out employees after an impasse had been reached. In Harter Equipment Inc., 280 NLRB 597 (1986) the Board held that an employer may use temporary replacements during a lockout for the purpose of bringing economic pressure to bear in support of its legitimate bargaining demands. See also B-Bar-B, Inc., 281 NLRB 250, (1986); National Gypsum Company, 281 NLRB 593 (1986); Birkenwald Distribution Co., 282 NLRB 954 (1987). In International Brotherhood of Boilermakers Local 88 v. NLRB, 858

F.2d 756, (D.C. Cir. 1988), the Court agreed with Board's conclusion that an employer may engage in an offensive lockout while using temporary replacements.

In my opinion Field Bridge was privileged to convert the economic strike into an economic lockout when the strikers asked for reinstatement. As such, it is my opinion that it had no obligation to reinstate these strikers so long as it maintained the lockout in support of its position vis a vis a collective bargaining agreement with the Union.

The evidence indicate however that the lockout came to an end on April 10, 1989, when the employer began to make offers of reinstatement to the strikers. Such offers were made to various of the strikers in April, May and June of 1989, albeit offers were

never made to some of the strikers.

The lockout having ended on April 10, 1989 it was then incumbent on the employer to offer reinstatement to all of the strikers who had offered to return to work unless there was a justifiable impediment to so doing. For example, if some of the strikers had been permanently replaced before the lockout and if those permanent replacements were shown to have been employed as of April 10, that might excuse a failure to immediately reinstate an equal number of the strikers. However, the evidence does not show that there were such permanent replacements on Field Bridge's payroll as of April 10. On the contrary, the evidence establishes that on January 12, 1988 Field Bridge subcontracted out the service and maintenance work to M&M Maintenance Corporation and that

such subcontracting was intended to be a temporary arrangement during the pendency of the labor dispute. (It was stipulated that the subcontracting arrangement was an oral agreement and was terminable at the will of either party). Therefore, in the absence of evidence indicating any legitimate justification, I conclude that the Respondent violated Section 8(a)(3) of the Act by failing to offer reinstatement to those strikers who were not offered reinstatement on April 10, 1989. A fortiori, it is clear that the company violated Section 8(a)(3) insofar as those strikers who were never offered reinstatement at all.

Conclusion of Law

1. By failing to offer reinstatement on April 10, 1989 to all of the strikers who had previously offered to return to work, Field Bridge

engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1)&(3) and Section 296) and (7) of the Act.

2. The Respondents have not violated the Act in any other manner encompassed by the Complaints.

Remedy

Having found that Field Bridge has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In view of my conclusion that Field Bridge, upon the termination of the lockout, failed to offer reinstatement to all of the strikers who had previously offered to return to work, it is recommended that the Respondent be ordered to offer such employees, (other those who did receive

such offers on April 10), immediate and full reinstatement to their former positions or, if those jobs no longer exist to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make them whole for any losses they suffered from April 10, 1989. To the extent, however, that valid reinstatement offers were made to strikers on May 5, 23, and July 24, 1989 or at any time thereafter, backpay should be terminated on whatever date a striker received a valid offer of reinstatement. Backpay should be computed in accordance with F.W. Woolworth Co., 90 NLRB 289 (1950) and New Horizons for the Retarded, 283 NLRB 1173, (1987).

On these finds of fact and conclusions of law and on the entire record, I issue the following

recommended.[8]

Order

The Respondent, Field Bridge Associates, its officers, agents, successors and assigns, shall

1. Cease and desist from

a. Upon the cessation of the lockout, refusing to reinstate economic strikers upon their unconditional offers to return to work.

b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to

---

[8] If no exceptions are filed as provided by Sec.102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

effectuate the policies of the Act.

a. Offer reinstatement to all strikers who did not receive such offers on April 10, 1989, to their former positions of employment, or if those jobs no longer exist to substantially equivalent positions, without prejudice their seniority or other rights and privileges, and make them whole for any loss or earnings in the manner set forth in the remedy section of this decision.

b. Preserve and on the request, make available to the Board or its agents for examination and copying, all payroll records, social security, payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

c. Post at its facilities

in New York, copies of the attached notice marked "Appendix B."[9] Copies of the notice, on forms provided by the Regional Director of Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

d. Notify the Regional Director in writing within 20 days from

---

[9] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaints be dismissed insofar as they allege violations of the Act not specifically found.

Dated: Washington, D.C. August 22, 1990

RAYMOND P. GREEN
Administrative Law Judge

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD
DIVISION JUDGES
NEW YORK BRANCH OFFICE

FIELD BRIDGE ASSOCIATES

and Cases 29-CA-13582
29-CA-13788

LOCAL 32B-32J, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

RACHEL BRIDGE CORP.

Cases 29-CA-13720

and (formerly 2-CA-23014)

LOCAL 32B-32J, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

ORDER

On February 27, 1989 a Consolidated Complaint was issued in these cases by the Regional Director of Region 29 of the National Labor Relations Board. In pertinent part the Complaint alleged that:

1. That Respondent Field Bridge Associates on July 1, 1987 executed a contract of sale pursuant to which it,

inter alia agreed to assume the collective bargaining agreement of the seller when Field Bridge purchased a group of apartment buildings called the Ebbets Field Housing Complex.

2. That Respondent Field Bridge, on July 1, 1987 commenced operating the Ebbets Field complex retaining in its employ a majority of the service and maintenance employees and security guards who worked for the seller.

3. That Rachel Bridge Corp., on July 1, 1987 executed a contract of sale pursuant to which it, inter alia, agreed to assume the collective bargaining agreement of the seller when Rachel Bridge purchased Washbridge Apartments.

4. That Rachel Bridge Corp., on July 1, 1987 commenced operating the Washbridge Apartments retaining in its employ a majority of the service and

maintenance employees and security guards who worked for the seller.

5. That both Respondents were successors and that the Respondents violated Section 8(a)(1) & (5) of the Act when they refused to remit dues and initiation fees and when, after the collective bargaining agreements expired, they unilaterally failed and refused to continue to make payments to the contractually provided Health and Pension Funds.[10]

The Respondents' Answer denies that they assumed the collective bargaining agreements and deny that

---

[10] As to the dues and initiation fees, the Complaint alleges that the Respondents refused to make such payments from July 20, 1987. In the case of Pension and Health payments, the Complaint alleges that the refusals commenced on August 1, 1987. As to all payments, the Complaint alleges that the Respondents continued to refuse to make such payments from December 14, 1987, a date six months prior to the filing of the unfair labor practice charges.

they are "successors". Further, the Answer asserts a number of affirmative defenses, one of which that even if the Respondents executed agreements assuming the sellers' collective bargaining agreements, the Union by its subsequent acts, repudiated such agreements.

The Charging Party contends that prior to the sale of the Ebbets Field Complex it filed for arbitration in two cases involving the discharge of employees by the former owner. When it learned of the sale to Field Bridge it amended its notice of arbitration to include the new owner. Field Bridge then initiated an action in New York State Supreme Court to stay the arbitrations and those cases were consolidated before the Honorable Ira Gammerman. The action to stay the arbitrations was premised at least in

part, on the argument of Field Bridge that it had not assumed the collective bargaining agreement when it purchased the property. In a proceeding where no witnesses were called or were subject to cross examination, Judge Gammerman, on April 26, 1988, issued an oral Decision denying a stay of the arbitration. That Decision was affirmed by a one line Order of the Appellate Division on November 3, 1988. On April 4, 1989 the New York State Court of Appeals denied Field Bridge's request for permission to appeal to that Court.

A similar scenario was played out at the Washbridge Apartments. Thus prior to the sale, the Union sent notices of arbitration to the former owner and amended these after it became aware of the sale to Rachel Bridge. Rachel Bridge also moved in State Court

to have the arbitration stayed against it, contending, inter alia, that it had not assumed the collective bargaining agreement when it purchased the property. That case was assigned to the Honorable Karla Moskowitz who, after the Appellate Division ruled in the Field Bridge matter, issued an oral decision denying the stay of arbitration. As in the prior case, no witnesses were called or cross examined.

The Charging Party, with whom the General Counsel joins, contends that I should strike Respondents' Answer insofar as it denies that Respondents assumed the collective bargaining agreements. They also argue that I should strike the affirmative defense which contends that the Union repudiated the contracts. The contentions of the Charging Party and

the General Counsel are premised on the findings in the prior State Court proceedings, and it is argued that those findings are binding on the same issues in this case. Such a contention is not, however, consistent with current Board law iasmuch as the Board was not a party in the State Court proceedings. See Donna Lee Sportswear Co., Inc. 281 NLRB 719 (1986) enfd denied 127 LRRM 2209 (1st Cir., 1987).

It is my opinion, having carefully reviewed the materials submitted, that the issues raised by the Consolidated Complaint and the Answer are complex as to both law and fact and that they would best be resolved after a full hearing on the issues.[11]

---

[11]I note that the Complaint on its face alleges units which combine guards and non guards. This may or may not, depending on the facts, raise an issue under Section 9(b)(3) of the Act. If so, it certainly was not an issue which was raised or decided in the State

Based on the foregoing, it is Ordered that the Motions by the Charging Party and the General Counsel to strike certain portions of the Respondents' Answer be and they hereby are denied.

Dated at New York, New York
this 17th day of July 1989.

Raymond P. Green
Administrative Law Judge

Court proceedings.

APPENDIX B

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States
Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT, upon the cessation of a locakout, refuse to reinstate economic strikers when they unconditionally offer to return to work.

WE WILL NOT in any like or related manner interfere with, restrained, or

coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer reinstatement to all strikers who did not receive such offers on April 10, 1989, to their former positions of employment, or if those jobs no longer exist to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and benefits they may have suffered.

Field Bridge Associates
(Employer)

Dated_____ By_____
Representative (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days form the date of posting and must not be altered, defaced, or covered with any other

material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 75 Clinton Street, Brooklyn, New York 11201. Telephone No. 718-330-2862.

Supreme Court, U.S.
FILED
MAY 6 1993
OFFICE OF THE CLERK

No. 92-1616

In The

Supreme Court of the United States

October Term, 1992

LOCAL 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

DISCLOSURE OF INTERESTED PARTIES

Pursuant to Rule 29.1 of the Rules of the Supreme Court, Rachel Bridge Corp. has no parent companies, affiliates or subsidiaries that have issued shares to the public. Field Bridge Associates is a real estate partnership that has no parent companies or subsidiaries.

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SUMMARY OF ARGUMENT

1. The NLRB's requirement that that assumption of a collective bargaining agreement by conduct be established by clear and convincing evidence is consistent with the Supreme Court's decision in *NLRB v. Burns Int'l. Sec. Servs.*, 406 U.S. 272 (1972) and Section 10(c) of the National Labor Relations Act.

2. Collateral estoppel was inapplicable in the instant case because the state court decision resolved a different issue from that resolved by the National Labor Relations Board.

POINT I

RESPONDENTS DID NOT ADOPT ANY UNION AGREEMENT BY THEIR CONDUCT.

Petitioner contends that Respondents adopted the RAB Agreement through their conduct after acquiring the property. Even assuming that Respondents were "successor employers" within the meaning of *NLRB v. Burns Int'l. Sec. Servs.*, 406 U.S. 272 (1972) and its progeny, and thus obligated to recognize and bargain with the Union, they were not bound by any specific labor contract absent a clear and unequivocal intention to be so bound.[1] 406 U.S. at 294-95. The burden of proving an intent to adopt

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[1] It has always been the position of Respondents that they are *not* successors since the unit in the RAB Agreement was inappropriate. Petitioner's assertion in footnote 5 is factually incorrect.

the RAB Agreement is on the party asserting that position. The facts herein in support of adoption were ambiguous at best, and hence did not warrant such a finding.

The record established that the union dues improperly deducted by Field Bridge were never transmitted to the Union and were returned to each employee, with interest. The claim of promised medical benefits, also relied upon by the Union, also did not evince an intent to be bound by the RAB Agreement. The fact that Field Bridge promised an employee medical coverage did not mean it would be the medical coverage under the RAB Agreement. Significantly, Field Bridge did not make any payments to the Union's Health and Welfare Fund.

Rachel Bridge's post-transfer conduct also did not constitute an adoption of the RAB Agreement. The Union focused upon two checks drawn on Rachel Bridge's account by Arco for the Union Health and Welfare and Pension Funds. However, both checks were inadvertently issued based upon unauthorized signatures of two officers of Arco. This was done in direct violation of a corporate resolution filed with the bank, which error was acknowledged by it and which credited Rachel Bridge's account in full. No agreement was made to assume Arco's contract with the Union when Rachel Bridge subsequently terminated Arco's managing services.

The inadvertent deduction of union dues does not establish an adoption of a contract. Local 32B-32J. *SEIU v. Sage Realty Corp.*, 524 F.2d 601, 603 (2d Cir. 1975). Furthermore, the mere continuation of economic benefits prevailing at the time of takeover, without more, does not

establish an adoption of the contract. *All State Factors,* 205 NLRB 1122 (1973). *Id.* at 1127.

Significantly herein, Respondents did not adhere to the vast majority of contractual provisions as evidenced by the instant proceeding and arbitrations alleging a failure to comply with numerous terms of the RAB Agreement.

Respondents further demonstrated that they had no intention to adopt the RAB Agreement by reaching out to the Union to negotiate a new agreement in late 1987. Such conduct was certainly inconsistent with any contention that they felt bound by the RAB Agreement.

The Burns decision clearly "counsels utmost restraint in applying an adoption theory, absent *clear and convincing evidence of consent." All State Factors, supra* at 1127 (emphasis added). Since Respondents' conduct in the instant case was ambiguous at best, it would have been inappropriate to find that an adoption occurred. In *Burns,* the Supreme Court cautioned that "holding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities." *Burns,* 406 U.S. at 287-288. The Court there explained:

> A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes

impossible and may discourage and inhibit the transfer of capital.

The Petitioner's contention that the Board erred in requiring a clear and convincing standard of proof rather than the preponderance of the evidence standard is without merit. The Petitioner has confused the General Counsel's overall burden of proof with the quality of the evidence needed to sustain that burden. It is settled that the Board may require different evidentiary standards depending on the kind of finding at issue. See, for example, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 707-709 (1983) (waiver of protected right must be expressed clearly and unmistakably); *Chesapeake & Potomoc Tel. Co. v. NLRB*, 687 F. 2d 633, 636-637 (2d Cir. 1982) (same). Accordingly, to establish the unfair labor practice of refusal to bargain, General Counsel would only have to prove by a preponderance of evidence that Respondents refused to bargain. However, General Counsel would have been required to establish the obligation to bargain by virtue of assumption of the contract by clear and convincing evidence. In any event, under either standard, General Counsel would not have been able to establish assumption.

POINT II

THE BOARD WAS NOT REQUIRED TO APPLY COLLATERAL ESTOPPEL TO THE STATE COURT DECISION

The Petitioner contends that the decision of New York State Supreme Court that Field Bridge and Rachel Bridge intended to assume the RAB Agreement with the

Union when they purchased the properties in July, 1987, should be given a *collateral estoppel* effect.

The Board has held it is not precluded from "litigating and ruling on the same and other related issues" because it was not a party to the prior state court actions. *Donna-Lee Sportswear Co., Inc.*, 281 NLRB 719, 719 n.2 (1986), enforcement denied, 836 F.2d 31 (1st Cir. 1987). As stated by the Board in *Allbritton Communications, Inc.*, 271 NLRB 201, 202 n.4 (1984), enforced, 766 F.2d 812 (3d Cir. 1985):

> The general rule is that the Government, not having been a party to the prior litigation, is not barred from litigating an issue involving enforcement of Federal law which a private plaintiff has litigated unsuccessfully.

(citations omitted). Accord *Newport News Shipbuilding and Dry Dock Co.*, 253 NLRB 721, 726-29 (1980), enforced, 663 F.2d 488 (4th Cir. 1981).

Section 1 of the National Labor Relations Act provides that its purpose is to eliminate industrial strife which impairs the free flow of commerce. In the instant case, the Union caused strikes to be conducted against Respondents on the express basis that there were no collective bargaining agreements in existence. When the strikes failed, the Union claimed that agreements had in fact been in existence. The Board has an interest in protecting the public interest by discouraging labor organizations from engaging in such tactics. In such circumstances in the future, it is less likely that Local 32B-32J will conduct a strike claiming there is no contract believing it can rely on its "fall-back" position that there

is a contract. This protects the public from unnecessary strikes pursuant to the purpose of the Act.

Under New York law, a valid final judgment on the merits precludes relitigation of an issue of fact or law only where it is established: (1) that there is an "identity of an issue" that was necessarily decided in the earlier proceeding with one that is decisive in the second action; and (2) the opposing party has not been denied a "full and fair opportunity" to contest the issue now said to be controlling. *Staatsburg Water Co. v. Staatsburg Fire District,* 72 N.Y.2d 147, 531 N.Y.S.2d 876 (1988); *Halyalkar v. Board of Regents,* 72 N.Y.2d 261, 532 N.Y.S.2d 85 (1988). Both of these tests must be satisfied in order to permit the judgment in the first action to preclude litigation of an issue in the second action. The Union has failed to establish that these tests have been met.

The claims in the State Court proceedings involved the Union's charge that Respondents were responsible *to arbitrate* alleged violations of the collective bargaining agreement *committed by the prior employer* and occurring *before* the July 1, 1987 transfer date. This proceeding, on the other hand, involves the claim by the Union that Respondents are *responsible for* alleged statutory violations *committed by Respondents themselves after* the transfer of the properties and *after* the collective bargaining agreement expired. There is no "identity of interest" between the cases to warrant the preclusion urged by the Union.

The evidence necessary to decide the unfair labor practice issues is different than the evidence relied on in the State Court proceedings. There, Justices Gammerman and Moskowitz primarily considered the written real

estate contract and the practices of the real estate industry to find an intent to assume the contract. They did not consider the post-transfer conduct of the Union and Respondents to support their determinations. In this proceeding, it was precisely these post-transfer acts which proved that the Union acquiesced in the position that there was no assumption of the agreements.

The Petitioner's argument overlooks the fact that, in addition to handling unfair labor practice complaints, the Board is responsible for resolving representational issues, including identification of an appropriate bargaining unit and certification of an exclusive bargaining agent. The district courts, on the other hand, are vested with limited jurisdiction pursuant to Section 301 of the Labor Management Relations Act ("LMRA") (29 U.S.C. Section 185(a)). *Amalgamated Clothing and Textile Workers Union, AFL-CIO v. Facetglas, Inc.*, 845 F.2d 1250, 1251-52 (4th Cir. 1988).

In the instant proceeding, the Board was called upon to decide whether or not the Union was the exclusive bargaining representative for the mixed-guard unit described in the RAB Agreement. There is no doubt that recognitional and representational issues such as this one, involving mixed-guard units and unions under Section 9(b)(3) of the Act, are within the exclusive jurisdiction of the Board and not within a court's jurisdiction to decide. See *Teamsters, Local 682 v. Bussen Quarries, Inc.*, 849 F.2d 1123 (8th Cir. 1988).

In sum, there is nothing in the decisions of the New York State Supreme Court which barred or precluded the Board from issuing its decision herein.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 27 1993
OFFICE OF THE CLERK

No. 92-1616

In the Supreme Court of the United States

OCTOBER TERM, 1992

LOCAL 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board permissibly applied a clear and convincing evidence standard in determining whether two companies assumed the prior employer's collective bargaining agreement when they purchased two apartment complexes.

2. Whether the court of appeals correctly found that the Board, in determining whether the new owners had assumed the prior employer's collective agreement, was not required to give collateral estoppel effect to state court rulings declining to stay arbitration proceedings that the union had initiated against the prior employer and to which the union had added the new owners.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1626

LOCAL 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A14, is reported at 982 F.2d 845. The decision and order of the National Labor Relations Board (Board), Pet. App. B1-B13, including the decision and recommended order of the administrative law judge (ALJ) (Pet. App. B14-B107), is reported at 306 N.L.R.B. No. 72.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1993. The petition for a writ of certiorari was

filed on April 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In late 1986, Field Bridge Associates (Field Bridge) and Rachel Bridge Corporation (Rachel Bridge) agreed to purchase two apartment complexes—Ebbets Field Housing Complex (Ebbets Field) and Washbridge Apartments (Washbridge)—from Cedar York Properties Limited Partnership (Cedar York).[1] Pet. App. B24-B25. At the time of the purchase, the two properties were being managed by Arco Management Corporation (Arco), whose employees were represented by petitioner, Local 32B-32J, Service Employees International Union (the Union). Arco's employees were covered by the terms of a collective agreement between the Union and the Realty Advisory Board on Labor Relations (RAB), a multi-employer group; the agreement was to expire on April 21, 1988.[2] *Id.* at B20-B21, B58. Under the RAB agreement, the collective bargaining units at Ebbets Field and Washbridge included both service and maintenance em-

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[1] Field Bridge purchased Ebbets Field, and Rachel Bridge purchased Washbridge.

[2] Arco had been appointed the management agent of the two properties by the New York Division of Housing and Community Renewal (DHCR). As a result of DHCR's intervention, Cedar York had no contractual relationship with Arco, and did not authorize Arco to enter into the RAB agreement. Pet. App. B21-B22. The sales contract negotiated between Cedar York and the companies purchasing the two apartment complexes provided that any contracts and service agreements relating to the operation or maintenance of the premises that are assumed by the purchaser shall be specified in Schedule I, a form annexed to the contract. *Id.* at B26. Schedule I was left blank and the parties did not enter into a separate written agreement under which Field Bridge or Rachel Bridge would specifically assume the RAB agreement between the Union and Arco. *Id.* at B26, B31.

ployees and security guards in roughly equal numbers. *Id.* at B22.

On July 1, 1987, after taking over operation of the respective properties, Field Bridge and Rachel Bridge retained all of the Arco employees and continued their existing wages and benefits. Pet. App. B32. The new owners, however, ceased remitting dues to the Union and refused to contribute to its health and pension funds. *Id.* at B32-B33, B35-B37. Upon taking over, Field Bridge immediately terminated Arco as management agent, and Rachel Bridge did so a month later. *Id.* at A4.

Sometime in July 1987, the Union met with Field Bridge personnel to discuss signing a collective bargaining agreement. Pet. App. B37. In mid-August, the Union gave Field Bridge the Independent Apartment House Agreement (IAHA Contract), which was not the RAB agreement to which Arco had assented. The Union asked Field Bridge to have its attorney review the contract and return it in a few weeks. *Id.* at B37-B38. In December 1987, Field Bridge met with the Union to negotiate an agreement. At the initial meeting, the Union stated that Field Bridge had not signed an assent agreement to be bound by the RAB agreement. *Id.* at B48-B50. At a subsequent meeting, the Union's attorney stated that Field Bridge could not have the RAB agreement because it had not been assumed within 30 days of closing, as required by Article IX of the agreement. According to Field Bridge, the Union wanted Field Bridge to sign the IAHA contract, excluding guards, retroactive to the date of purchase.[3] *Id.* at B52-B53.

---

[3] The parties were in agreement that the Union was not entitled to recognition for a unit including both guards and non-guards. Pet. App. B48.

In late October 1987, the Union sent Rachel Bridge a letter offering it the opportunity to enter into the IAHA contract. The letter also gave Rachel Bridge the option of negotiating a new collective bargaining agreement, but not of signing the RAB agreement. Pet. App. B39-B40. At a subsequent meeting on November 24, 1987, between representatives of the Union and Rachel Bridge, the Union rejected Rachel Bridge's contract proposal and asked Rachel Bridge to sign the IAHA contract. The Union's attorney stated that Rachel Bridge could not have the RAB agreement because the 30-day period for its assumption had expired. No Union representative took the position that Rachel Bridge had assumed the existing RAB agreement when it purchased Washbridge. *Id.* at B42-B43.

On January 14, 1988, the Union tendered a new contract proposal to Field Bridge. Field Bridge rejected the Union's proposal and countered with its own, but no agreement was reached. Pet. App. B54-B55. On the same date, the Union made Rachel Bridge a similar offer. It too was rejected, and no agreement was reached. *Id.* at B45-B46.[4]

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[4] In January 1988, the Ebbets Field employees went on strike. Pet. App. B53-B54. By September 1988, all the Ebbets Field employees had made unconditional offers to return to work. Field Bridge refused to reinstate the strikers at that time, thereby converting the strike into a lockout. *Id.* at B88-B89. The Board affirmed the ALJ's decision that the employees were economic strikers; that Field Bridge was entitled to lock them out in support of its bargaining position until April 10, 1989, when it began to reinstate some of the strikers; but that it violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(3) and (1), by refusing thereafter to reinstate all of the strikers who had offered to return to work. Pet. App. B83-B90. The court of appeals upheld the Board's decision in that respect, *id.* at A13-A14, and the petition does not challenge that ruling.

Meanwhile, in September 1987, the Union agent sought to add Field Bridge as a party to an arbitration proceeding involving an Ebbets Field employee discharged prior to Field Bridge's purchase of that property. Pet. App. B38-B39, B57. Several months later, on December 1, 1987, the Union sought to add Rachel Bridge as a party to an arbitration proceeding involving a Washbridge employee discharged prior to Rachel Bridge's purchase of that property. *Id.* at B40. In both cases the Union had initiated arbitration proceedings under the RAB agreement. Field Bridge and Rachel Bridge sought stays of the arbitrations in New York State Supreme Court. In a proceeding where no witnesses were called, Judge Ira Gammerman, on April 26, 1988, in an oral ruling, agreed with the Union's contention that Field Bridge had assumed the RAB agreement, and he issued an order refusing to stay the arbitration. Field Bridge unsuccessfully appealed Judge Gammerman's decision.[5] *Id.* at B4-B5, B100-B102.

After the state court ruling, Field Bridge advised the Union of its desire to negotiate a successor agreement to the RAB agreement that expired on April 21, 1988. Field Bridge also stated that its notice did not waive "any statutory or procedural recourse available to it" respecting the state court decision. Pet. App. B58. Thereafter, the Union complained to the contract arbitrator that Field Bridge had violated the RAB contract by its subcontracting of guard work. *Id.* at B59. In a final exchange of letters in mid-June, Field Bridge advised that it had not assumed the RAB contract, but that, if "a court or government agency" held to the

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[5] The Union used the judgment against Field Bridge to assert collateral estoppel against Rachel Field's petition to stay arbitration pending before New York State Supreme Court Judge Moskowitz, who gave it preclusive effect. Pet. App. A5, B5, B101-B102.

contrary, it was exercising the contractual cancellation provision. *Id.* at B59-B60. The Union replied that Field Bridge would have to "first recognize the existence of the agreement before it can exercise options thereunder." *Id.* at B60-B61.

2. The Union also filed unfair labor practice charges with the Board against Field Bridge and Rachel Bridge. Based on those charges, the Board's General Counsel issued a complaint alleging, *inter alia*, that the two companies were successors who had agreed to assume the existing collective agreements when they purchased the two apartment complexes. Pet. App. B16-B17.

The Board dismissed the complaint, finding, in agreement with the ALJ, that Field Bridge and Rachel Bridge had not assumed the RAB contract. Pet. App. B10, B63. The Board noted that it required "clear and convincing evidence of consent, either actual or constructive," to find assumption of a collective bargaining agreement. *Id.* at B10. The Board found no "unmistakable written manifestation of [the two companies'] intent with respect to the existing RAB contract." It added that the Union's conduct was inconsistent with an understanding that the companies had assumed the existing contract because the Union had "sought to bind the new owners to the Independent Apartment House Agreement or to negotiate an entirely new agreement." *Id.* at B10-B11, B73-B77.

The Board also concluded that the ALJ properly had refused to give collateral estoppel effect to the decisions of the New York State Supreme Court rejecting the companies' stay of arbitration applications. Pet. App. B4. The Board noted that it "adheres to the general rule that if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully." Pet. App. B5-B6. The

Board distinguished *NLRB* v. *Donna-Lee Sportswear Co.*, 836 F.2d 31 (1st Cir. 1987), noting that in that case the existence of a contract was the essence of the issue before both the Board and the court, while in this case the issues before the Board were not the same as those decided by the courts. Pet. App. B8 n.2.

3. The court of appeals concluded that the Board's finding that Field Bridge and Rachel Bridge did not assume the RAB agreement was supported by substantial evidence. Pet. App. A13. In so finding, the court held that the Board properly applied a clear and convincing standard in determining whether the new owners had assumed the contracts. *Id.* at A12. Citing *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 707-709 (1983), the court of appeals noted that the Board may use different standards of proof depending on the kind of finding at issue. Pet. App. A12. The court agreed with the Board that application of the clear and convincing standard gives effect to the admonition in *NLRB* v. *Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972), that a successor employer is not required to assume the predecessor's collective bargaining agreement. Pet. App. A12-A13.

The court of appeals also agreed that the Board was not bound by the decisions of the New York courts. The court did not reach the Board's argument "that the Board can never be precluded on successorship issues by state court findings." Pet. App. A7-A8. Rather, the court concluded that the Union's claim "fails under general principles of preclusion law," in that the issues before the state court and the Board were not identical. *Id.* at A8 & n.1, A11. The court of appeals explained that a successor employer may be bound by the predecessor's agreement to arbitrate without necessarily being bound by the substantive terms of the contract; the arbitrator must determine what other obligations of the contract

were binding on the successor. *Id.* at A8-A10, citing *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964); *Burns*, 406 U.S. at 286. Here, the New York courts found only that Field Bridge and Rachel Bridge had a duty to arbitrate; those courts did not have before them the issue of whether those companies were, in fact, bound by the RAB agreement, the issue decided by the Board. Pet. App. A9-A11.

ARGUMENT

Petitioner contends that the Board applied an incorrect standard in determining whether Field Bridge and Rachel Bridge had assumed the RAB agreement, Pet. 18-26, and that, in any event, the Board was required to give collateral estoppel effect to the two New York state court determinations that Field Bridge and Rachel Bridge were required to arbitrate the question whether they had assumed that agreement. Pet. 26-42. There is no merit to those contentions and they raise no issue warranting review by this Court.

1. A successor employer is obligated to recognize and bargain with the representative of the predecessor's employees, but it is not bound by the predecessor's collective bargaining agreement absent assumption. *NLRB* v. *Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 284 (1972); *Howard Johnson Co.* v. *Detroit Local Joint Executive Bd.*, 417 U.S. 249, 261 (1974). In *Burns*, the Court cautioned that "holding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities."[6] 406 U.S. at 287. Under *Burns*, an as-

[6] The Court explained that "[s]addling [a successor] employer with the terms and conditions of employment contained in the old collective-bargaining contract may make [needed] changes impossible and may discourage and inhibit the transfer of capital." 406 U.S. at 288. The Court added that "a union [that] may have

sumption of a collective bargaining agreement can only come about by mutual consent, evidenced either by a writing or by the conduct of both parties. Consistent with those principles, the Board requires clear and convincing evidence of consent, either actual or constructive, before it will find that an assumption of the contract has occurred. *EG&G Florida, Inc.*, 279 N.L.R.B. 444, 453 (1986); *All State Factors*, 205 N.L.R.B. 1122, 1127 (1973).

Petitioner contends (Pet. 21-24) that, since preponderance of the evidence is the standard for determining whether an unfair labor practice has occurred,[7] the Board may not use a more stringent standard for determining the subsidiary issue of contract assumption. This Court has made clear, however, that the Board may impose a different standard in evaluating particular conduct incident to an unfair labor practice finding, when that is necessary to effectuate the purposes of the Act. In *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693 (1983), the issue was whether the employer had unlawfully discriminated by imposing more severe sanctions on union officials than on other employees for violating a contractual no-strike clause. A subsidiary issue was whether the union could waive the union officials' statutory right not to be disciplined more severely than other employees for engaging in strike activity. While holding that such a waiver was permissible, the Court applied a "clear and unmistakable" standard to determine whether a waiver

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made concessions to a small or failing employer * * * [may] be unwilling to make [concessions] to a large or economically successful firm." *Ibid.*

[7] Section 10(c) of the Act, 29 U.S.C. 160(c), places upon the General Counsel the burden of proving an unfair labor practice by a preponderance of the evidence. See *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 401 (1983).

had occurred. *Id.* at 708. The Court refused to "infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'" *Ibid.*

Similarly, "[i]n determining whether an employer has assumed its predecessor's labor contract, the [Board] is not bound by technical rules of contract law; rather, it may adapt those rules to the collective bargaining context." *NLRB* v. *Babad*, 785 F.2d 46, 49-50 (2d Cir. 1986). Accord *NLRB* v. *Donkin's Inn, Inc.*, 532 F.2d 138, 141-142 (9th Cir.), cert. denied, 429 U.S. 895 (1976). As the court of appeals correctly concluded, "[t]he Board's decision to require clear and convincing evidence of consent is one such adaptation"; it gives effect to *Burns*' counsel to exercise "utmost restraint" in finding an assumption.[8] Pet. App. A12, quoting *All State Factors*, 205 N.L.R.B. 1122, 1127 (1973).

2. Petitioner also challenges (Pet. 26-42) the Board policy of refusing to give collateral estoppel effect to issues determined in litigation between private parties. That policy is not squarely at issue in this case. The court of appeals, while acknowledging the force of the Board's position, did not find it necessary to consider it. Instead, the court determined that the Union's collateral estoppel claim fails under general principles of preclusion law because the issues before the Board and the state courts were not identical. Pet. App. A8.

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[8] Petitioner also appears to contend (Pet. 18-20) that the Board is required to apply the same standard in determining contractual issues as would a court in proceeding under Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185. This Court, however, has noted that, although the Board's determination of unfair labor practices may involve contract determination, its proceedings and grievance/arbitration proceedings are separate regimes. *NLRB* v. *Strong Roofing & Insulating Co.*, 393 U.S. 357, 360-362 (1969).

The Union does not question the proposition that collateral estoppel is not appropriately applied where the issue in the second tribunal is not the same as that in the first. Accordingly, the only issue presented is whether the court of appeals correctly held that the issues before the courts and the Board were not identical. That fact-based question does not warrant review by this Court. In any event, the court of appeals' finding is correct.

As the court of appeals correctly noted, Pet. App. A9, it does not follow from a finding that an employer is required to arbitrate an issue under a collective bargaining agreement that it necessarily has assumed the substantive provisions of an agreement. In *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964), the Court ruled that a subsequent employer was bound by its predecessor's agreement to arbitrate, *id.* at 547-551, but left for arbitration the question of what other obligations of the collective bargaining agreement were binding on the subsequent employer. As the Court explained in *NLRB* v. *Burns Int'l Sec. Servs., Inc.*, *supra*, *Wiley* held that "the agreement to arbitrate * * * survived the merger and left to the arbitrator * * * the ultimate question of the extent to which, if any, the surviving company was bound by other provisions of the contract." 406 U.S. at 286.

Here, the state courts decided only that Field Bridge and Rachel Bridge were required to join an arbitration proceeding against the old employer concerning discharges that had occurred during the latter's regime. Those grievances did not involve the companies' obligation to pay dues and fringe benefits under the RAB collective bargaining agreement, which the Union sought to enforce through its unfair labor practice charges filed with the Board. In any case, the issue of the companies' obligations under the RAB agreement

would be for the arbitrator.[9] Accordingly, the issue before the courts—whether the companies were required to arbitrate grievances arising under the RAB agreement—and the issue before the Board—whether the companies were required to adhere to all the substantive terms of that agreement—are plainly different issues.[10]

Contrary to petitioner's contention (Pet. 40-42), the holding of the court of appeals does not conflict with *NLRB* v. *Donna-Lee Sportswear Co.*, 836 F.2d 31 (1st Cir. 1987), and *NLRB* v. *Heyman*, 541 F.2d 796 (9th Cir. 1976). As the court of appeals correctly noted, in both of those cases "the issue before the federal district court

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[9] In December 1987, the Union filed a grievance with the contract arbitrator against the old owner and Arco asserting that those parties had violated the RAB agreement by selling the Ebbets Field complex to an employer (Field Bridge) that did not, *inter alia*, pay into the Union pension and welfare funds. The Union did *not* name Field Bridge in that proceeding, and only sought damages from the predecessor employer. Pet. App. B50-B52.

[10] Moreover, because, as we have shown (see pp. 8-10, *supra*), the Board properly applies a clear and convincing standard of proof to the assumption issue, collateral estoppel would not apply for that reason as well. The question for the courts is whether there is any plausible basis on which an arbitrator could find assumption. See *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960) ("[d]oubts [about arbitrability] should be resolved in favor of coverage"). A showing of assumption under that lenient standard may well fail to meet the Board's more stringent clear and convincing standard. The difference in standards renders the doctrine of collateral estoppel inapplicable. See *Grogan* v. *Garner*, 111 S. Ct. 654, 658 (1991) (a determination of fraud reached under "the prepondence of the evidence * * * standard * * * could not be given collateral estoppel effect" in a subsequent proceeding in which fraud must be established by clear and convincing evidence; citing Restatement (Second) of Judgments § 28(4) (1982)).

and the issue before the Board were the same."[11] Here, in contrast, "the issues of agreement to arbitrate and of assumption of an entire contract are not the same." Pet. App. A11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] In *Donna-Lee*, the First Circuit held that the Board was collaterally estopped by a federal district court finding, in a trustee's suit for payment of benefit funds, that no collective bargaining agreement existed between the employer and the union. In *Heyman*, the Ninth Circuit held that the Board was collaterally estopped by a district court order, in a Section 301 suit, rescinding a collective bargaining agreement.